INDEX.

ABANDONMENT OF WIFE:

1. Where one abandons his wife and child in August, 1873, an indictment found against him in November, 1877, under Bat. Rev. ch. 32, §§ 119, 120, is barred by the statute of limitations, though the separation be continued up to that time. *State* v. *Davis*, 603.
2. If a warrant be issued against the husband and father in September, 1877, for such abandonment, and, upon the trial of the same, he agrees to support the wife and child, and does so for two weeks, but thereafter fails to comply with his engagemen, such failure constitutes a fresh abandonment, and will sustain an indictment found in November, 1877. *Ibid.*

ACCOUNT AND SETTLEMENT—See Guardian and Ward 3; Interest 1; Legacy 1; Statute of Limitations 3.

ACTION TO RECOVER LAND:

1. On the trial of an action to recover land, it appeared that a tenant of the plaintiff had been dispossessed by one of the defendants; *Held*, that evidence that the defendant informed the tenant at the time that he was acting as sheriff, was immaterial. *Wiseman* v. *Penland*, 197.
2. On the trial of an action to recover land, the plaintiff, to show its value at the time of a certain execution sale, offered to prove who was in possession at a certain time; the Court below admitted the testimony as evidence of possession; *Held*, not to be error. *Ibid.*
3. On the trial of an action to recover land, it appeared that in 1841, J and R agreed in writing to convey to W, upon the payment of the purchase money, certain lands, the boundaries of the same as set out in the agreement being definite; afterwards, upon the payment of the purchase money, J and the executors of R (then deceased) executed a deed to W; the *locus in quo* was embraced in the deed but it was disputed as to whether or not it was embraced in the agreement; *Held*,

   (1) That the agreement to convey was the joint contract of J and R.

(2) That the executors of R had no power to convey his estate in any land not embraced in the agreement.

(3) That admissions in writing of J as to what boundaries were intended to be conveyed by the agreement were not admissible as evidence against the representatives of R. *Young* v. *Griffith*, 201.

4. In such action the provisions of the Code do not prevent the plaintiff from demanding a specific performance of the agreement on the part of the representatives of R, notwithstanding the action was instituted prior to 1868. *Ibid.*

5. In an action to recover land, it appeared that in 1869 G obtained a judgment against F; that in 1873 F conveyed the *locus in quo* to defendant, the same having been regularly assigned to him as a homestead; that thereafter F went into bankruptcy and the *locus in quo* was assigned to him as a homestead by the assignee, and the reversionary interest therein was purchased by the defendant at assignee's sale; that after the adjudication of F as a bankrupt, the plaintiff purchased the *locus in quo* at a sheriff's sale under execution on G's judgment; *Held*, that plaintiff was not entitled to recover. *Hill* v. *Oxendine*, 331.

See Evidence 7; Husband and Wife 4; Parties 2; Practice 21.

ADULTERY—See Widow 1.

ADVANCEMENTS:

1. The provisions of section 11 of the charter of the bank of New Hanover (Private Laws 1871-'72, ch. 31) do not include *merchants* and cannot by implication be extended to them. *Bank of New Hanover* v. *Williams*, 129.

2. Under the provisions of such section the *lien* and *advancements* should be cotemporaneous acts; it was not intended that the bank at any time after making an advancement could take a lien upon all future purchases of the mortgagor for a general balance due on such advancements. *Ibid.*

See Mortgage 4.

ADVERSE POSSESSION:

1. The possession of one tenant in common being the possession of all, nothing less than a sole possession of twenty years by a co-tenant, without any demand or claim of another co-tenant to rents, profits or possession, he being under no disability

during the time, will raise a presumption in law that such sole possession is rightful, and protect it. *Neely* v. *Neely*, 478.

2. Adverse possession is an actual, visible and exclusive appropriation of land, commenced and continued under a claim of right, with the intent to assert such claim against the true owner, and accompanied by such an invasion of the rights of the opposite party as to give him a cause of action. *Parker* v. *Banks*, 480.

3. As the law never presumes a wrong, he who asserts an adverse possession against the better title must prove it, as well as allege it. *Ibid.*

4. A mortgagor in possession being the tenant of the mortgagee, his possession is not adverse to the mortgagee. *Ibid.*

See Statute of Limitations 6.

AFFIRMATIVE OF ISSUE—See Practice 2, 3.

AGENT AND PRINCIPAL—See Contract 1; Husband and Wife 6; Pleading 8.

AMENDMENT—See Practice 10, 15, 19, 46.

ANSWER—See Counterclaim; Pleading 4; Practice 36.

APPEAL—See Contract 9; Evidence 5; Practice 59; Roads 1, 2.

ARBITRATION AND AWARD:

1. The duty of arbitrators is best discharged by a simple announcement of the result of their investigations. They are not bound to decide according to law, but may decide according to their own notions of right without giving any reason therefor. *King* v. *Neuse Manufacturing Co.*, 360.

2. If they undertake to decide according to law, and it appears upon the face of the award that they have misconceived any principle of law applicable to the case, the award will be set aside. *Ibid.*

ARREST:

No one has authority, without process legally issued in this State, to arrest a person charged with crime in another State and fleeing here for refuge. Such an arrest makes the parties en-

gaged in it guilty of an assault and battery. *State* v. *Shelton*, 605.

ARREST AND BAIL:

1. An order of arrest issued after final judgment in an action is illegal and void. *Houston* v. *Walsh*, 35.
2. Where there is no order of arrest before judgment nor any complaint filed averring such facts as would have justified such order, a defendant cannot be arrested after judgment under an execution against the person under C. C. P. § 258. *Ibid.*
3. Such execution is irregular if, (1) it does not run in the name of the State and convey its authority to the officer to arrest the the defeudant, (2) if it is not made returnable to a term of the Court, (3) if it commands the officer "to commit the defendant to jail until he shall pay the judgment, &c., instead of "to have the defendant's body before the Court at its next term." *Ibid.*
4. The provisions of § 21, ch. 60, Battle's Revisal (Insolvent Debtor's Act), "that after an issue of fraud or concealment is made up, the debtor shall not discharge himself as to the creditors in that issue except by trial and verdict or by consent" only apply to cases where the defendant is in lawful custody and by virtue of an authority competent to order it. *Ibid.*

ASSAULT AND BATTERY—See Arrest.

ASSIGNOR AND ASSIGNEE—See Counterclaim 1.

ATTACHMENT;

Where, in a proceeding by attachment, it appears from the *whole* record, that the provisions of the statute have been substantially complied with, the action will not be dismissed, or the attachment dissolved. *Grant* v. *Burgwyn*, 513.

ATTORNEY—See Mortgage 9.

BANKRUPTCY

1. A discharge in bankruptcy operates to discharge a debt in existence at the time of the adjudication in bankruptcy and upon which a *judgment is thereafter obtained.* *Dawson* v. *Hartsfield*, 334.

2. In such case, the discharge can be pleaded upon a motion for leave to issue execution, whatever length of time may have elapsed since it was granted. *Ibid.*

3. A discharge in bankruptcy is a final discharge from all preceding debts, then provable. *Withers* v. *Stinson*, 341.

4. Where the plaintiff recovered judgment (which was duly docketed) against defendant in 1871 upon a debt contracted before 1860 and execution thereon was returned unsatisfied, the defendant's real estate being assigned to him as a homestead; and thereafter the defendant obtained a discharge in bankruptcy, his homestead having been also assigned by his assignee, the plaintiff not proving his judgment debt against the defendant's estate in bankruptcy; *It was held*, that the bankruptcy of defendant discharged the judgment, and that it was error in the Court below to grant the plaintiff leave to re-issue execution. *Ibid.*

5. A sale by an assignee in bankruptcy of land held in trust by the bankrupt to secure debts due himself, passes to the purchaser the debts secured as well as the legal estate in the land, and entitles him to possession until the debts are paid. *Green* v. *Green*, 343.

6. The defendant, who had been adjudged a bankrupt but not discharged, said to the plaintiff, to whom he was indebted before his bankruptcy: "Your debt I will pay if I live;" and again,—"Count the interest on the note and add the principal, and send it to me at Raleigh, and I will make a draw and send you the money for the note;" *Held*, that the jury were justified in finding thereupon a new and unconditional assumption of the old debt, entitling the plaintiff to recover, notwithstanding the bankruptcy. *Fraley* v. *Kelly*, 348.

See Action to recover Land 5.

BANK OF NEW HANOVER—See Advancements 1, 2; Contract 13.

BASTARDY:

On the trial of an issue of bastardy, the Court below charged the jury that "the written examination of the woman was presumptive evidence that the defendant was the father of the child, and that it devolved on him by a preponderance of evidence to show that he was not; and that if taking all the evidence into consideration, both sides were evenly balanced, the State was entitled to a verdict;" *Held*, not to be error. *State* v. *Rogers*, 609.

BOND—See Contract 2, 4, 22; Injunction 1.

BOUNDARY:

1. A call in a grant for a line "beginning at the mouth of a gut, *supposed* to be J's bounds, running along his *supposed* line south 300 poles in the pocosin to or near the head of Speller's creek &c." indicates that there was no established and known line, and the course and distance being certain in themselves must govern. *Mizell* v. *Simmons*, 182.
2. In such case the call being from an established corner "south 300 poles in the pocosin *to or near* the head of Speller's creek," the course and distance must prevail, without being controlled by the words "*to or near* the head of Speller's creek." *Ibid.*
3. In such case, to repel the allegation that there was a mistake in the mathematical call by course and distance or that there was any intention to make the head of the creek the terminus of the line irrespective of course and distance, it is competent to consider all the calls of the grant and also the diagram made at the time of the entry and survey and referred to in the grant. *Ibid.*
4. In such case, it was unnecessary as a matter of fact to ascertain where was the head of Speller's creek, because as a matter of law the terminus of the line was at the end of the course and distance called for. *Ibid.*
5. The Courts will construe "east" to mean "west," in the call for a line in a grant, when the mistake is obvious and fully corrected by the calls and an annexed plat. *Ibid.*

See Action to recover Land 3; Deed.

BURDEN OF PROOF—See Contract 3.

BUSINESS ENTRIES—See Evidence 16.

CHEROKEE NATION—See Registration of deed.

CHIEF OF POLICE, ELECTION OF—See Towns and Cities.

CLAIM AND DELIVERY—See Practice 51.

CLERK—See Salaries and Fees.

CLERK AND MASTER—See Official Bond 2.

COLOR OF TITLE—See Deed 9; Mortgage 5; Statute of Limitations 6.

COMMENTS OF COUNSEL—See Practice 60.

COMMERCIAL USAGE—See Contract 13, 15.

COMMISSIONS—See Executors and Administrators 15, 19; Official Bond 5.

COMMISSIONER TO SELL LAND—See Practice 35, 57.

COMPLAINT—See Counter-claim; Pleading 1, 3, 4, 5, 6, 7; Roads 4.

COMPULSION—See Duress.

CONFEDERATE MONEY:

Payments on a note in confederate money are to be credited at the nominal value of the currency paid, regardless of the fact that such payments were not endorsed on the note at the time.—*Norment* v. *Brown*, 363.

See Executors and Administrators 9, 10, 11; Guardian and Ward 5, 6.

CONFESSIONS—See Homicide.

CONFIRMATION—See Practice 25, 26, 28.

CONSENT—See Practice 58.

CONSIDERATION:—See Contract 2, 3; Pleading 6; Practice 48; Trusts 4.

CONTINUANCE:—See Practice 1.

CONTRACT:

1. Where several persons undertook, in the sum of one hundred dollars each that if a certain mercantile firm should furnish J. L. P., as agent for said firm, with goods for sale on commission *or otherwise*," in default of his fairly settling and accounting with

said firm, they would pay the amounts for which they were respectively bound; *Held*,

(1) That the obligation was to guaranty *the contract* of J. L. P. and was therefore absolute and unconditional; and that the makers of the paper were not entitled to notice from the firm of the delivery of the goods, nor of the failure of J. L. P. to pay for the same accompanied with a demand on the guarantors.

(2) That the obligation was not restricted to accountability for the first lot of goods delivered, but was intended to secure the firm from loss in their successive dealings with J. L. P., and provide them a continuing indemnity. *Straus & Co.* v. *Beardsley*, 59.

Semble, that the obligation bound the makers only for the acts of J. L. P. as agent, and not for absolute purchases made by him. *Ibid.*

2. In an action on a note, with or without seal, a recovery can not be defeated or the sum due be lessened by showing a partial failure of consideration. *Evans* v. *Williamson*, 86.

3. Where a party not himself bound by a contract, because of non-compliance with certain statutory requirements, seeks by action to enforce it against another who is bound, or does not rely on the statute, the latter can not defend himself by setting up the voidability of the other party's contract against his own legal obligation; *Hence*, where a guardian sold timber on the land of his ward without an order of Court as required in Bat. Rev. ch. 53 § 33, and took a note for the purchase money, the maker of such note can not when sued on the same by the guardian and ward, (the latter thereby ratifying the contract,) set up the failure of the guardian to observe the statutory mandate. *Ibid.*

4. Where the seal to a bond is defaced by the obligee, the bond is made void; if the defacement be by a stranger, it has no such effect. *Ibid.*

5. Where, on the trial of an action for damages for breach of contract, it appeared that the defendant, a judgment creditor of the plaintiff, had agreed with him that the judgment debt should be liquidated by the plaintiff's grinding a quantity of corn to be furnished by defendant, sufficient to pay off the debt, at eight cents per bushel of meal delivered to defendant, the plaintiff agreeing to grind all corn delivered to him under the contract at that price; and that thereafter the defendant after delivering a portion of the corn had declined to deliver

more and had collected the balance of the debt out of the plaintiff under execution; *It was held*,

(1) That it was not error for the Court below to refuse to submit an issue to the jury,—"Was getting the payment of the judgment the defendant's *sole* inducement for making the alleged contract?"

(2) That it was not errror to refuse to instruct the jury "that the profits which plaintiff would have made if the contract had been fully carried out, are not the proper measure of damages; that plaintiff is only entitled to actual damages, and having offered no proof of any such, is entitled to only nominal damages."

(3) Nor was it error to refuse to instruct the jury "that the contract was *nudum pactum*, or at least that it was so, if eight cents per bushel was a fair price for grinding." *Oldham* v. *Kerchner*, 106.

6. In such case, upon an issue as to whether or not the causes of action alleged in the complaint were compromised and settled between the parties upon sufficient consideration, it was not error for the Court to charge "that the jury must say whether plaintiff agreed with defendant's attorney to surrender his right of action for the alleged breach of contract, and if he did so agree in consideration of receiving the forbearance on the execution, as testified to, then this was a sufficient consideration binding on plaintiff, and the jury must find the issue in the affirmative; that a contract is the assent of two minds to the same thing in the same sense, and the jury must consider all the testimony on this point and say whether the plaintiff did so agree; that the plaintiff was not barred from recovering in this action by reason of his agreement in regard to any matter other than the cause of action sued on, and if in the conversation with said attorney, the plaintiff did not understand him as referring to the cause of action sued on, that they must find the issue in the negative." *Ibid.*

7. In such case, the true measure of damages is the difference between the cost of grinding and the contract price; that the charge of the Court below to that effect is not erroneous for failing also to charge "that the actual loss sustained by defendant's breach of contract was the true measure of damages, and if the plaintiff after defendant's refusal to deliver corn, did receive from others employment for such part of his machinery as would have been occupied in performing his contract with defendant, or by reasonable effort might have received such employment, the profit that was or might have

been thus made must be deducted from the profit he would have made had defendant performed his contract, in order to ascertain the actual damage," there being no evidence to which such a doctrine was applicable. *Ibid.*

8. Where in an action for damages for breach of contract, the plaintiff proves a contract, its breach and the loss of certain profit resulting from the breach, the burden is on the defendant to prove anything in diminution of damages. *Ibid.*

9. In this Court in a case on appeal the position of the appellee is strictly defensive; the judgment below is assumed to be right unless some specified error is shown; *Therefore*, in this action the plaintiff is not required to show from the case made out on appeal, that his claim was supported by evidence that his mill had not been so employed as to diminish his damages. *Ibid.*

10. A vendee who takes a warranty and gives notice that he buys to sell again in another market may include in his damages both the losses he actually sustains by reason of a breach of the warranty, and also the profits he would have made upon resale, had the article been what it was represented to be. *Lewis* v. *Rountree*, 122.

11. In an action for breach of warranty, where it appeared that the plaintiff purchased certain rosin from the defendants at Wilson, N. C., to be sold by them in some other market than Wilson, *of which defendants had notice*, and the rosin failed to come within the description warranted; *It was held*,

(1). That the contract of defendants was to deliver the rosin at any usual market to be named by the purchaser, the purchaser taking on himself the risk, trouble and expense of transportation.

(2) That the knowledge of the vendor of the purpose which the vendee had in view in making the purchase, was an essential element in estimating the damages likely to be sustained by a breach of warranty.

(3) That in such case the only just measure of damages is the difference between what the rosin would have sold for *in a reasonable time* after its purchase in the market which the plaintiff had by the circumstances of the contract a right to select, and did select (New York), if it had been what it was warranted to be, and the sum it did actually sell for or could have been sold for in that market, being what it was. *Ibid.*

12. In such case, the plaintiff is not entitled to interest upon the amount recovered for breach of warranty. *Ibid.*

13. On the trial below, it appeared that the plaintiff advanced money to one M for the purchase of rosin, with the understanding that M was to draw a draft upon the rosin to pay for the advancement; M shipped the rosin to defendants in New York and drew upon them in favor of plaintiff, sending a bill of lading to defendants with a letter "that he had drawn on them at 30 days for $2947.98 in favor of the cashier of plaintiff bank, *please protect;*" defendants protested the draft for non-acceptance and thereupon plaintiff telegraphed them "we hold registered mortgage on rosin shipped you by M and must follow it if draft is not accepted;" at the time of shipment there was a balance due defendants from M on account of mutual dealings theretofore of more than the value of the rosin; defendants had no notice of agreement between M and plaintiff that the proceeds of rosin should be applied to the payment of the draft; defendants sold the rosin and applied the proceeds due them from M; *Held*,

(1) That the telegram from plaintiff to defendants was evidence that the plaintiff did not claim that its agreement with M constituted an equitable assignment.

(2) That an agreement to pay a debt out of a particular fund is not an equitable assignment of the fund; and the agreement between M and plaintiff did not vest in the plaintiff any title, legal or equitable, to the rosin when purchased.

(3) That it was properly submitted to the jury as to whether or not the draft and letter constituted an *instruction* to defendants, by commercial usage, to appropriate the proceeds of the rosin to the payment of the draft; and the jury having found in the negative, the plaintiff can not recover.

(4) That it was not error to submit to the jury, an issue, that even if such instruction was given, did the long continued dealings between M and defendants, leaving a balance due them, warrant the defendants by the commercial usage in New York in refusing to accept the draft and applying the proceeds of the rosin to their own balance. *Bank of New Hanover* v *Williams*, 129.

14. In such case the defendants, not being parties or privies to the agreement between M and plaintiff, were left free to enforce their factor's lien against the proceeds of the rosin consigned to them by M, without liability to plaintiff. *Ibid.*

15. Courts, in administering commercial law, have the power and it is proper to submit to a jury as a question of fact, as well what is the meaning of commercial terms, as what was the

established commercial usage in respect of a certain course of dealing. *Ibid.*

16. On the trial below, it appeared that B and W, partners, executed a certain note in bank, with one P as security, which at maturity was replaced by another note executed by the same parties; that the latter after it became past due was surrendered to one V in exchange for certain drafts drawn by him upon W and payable to P, which drafts were made for the purpose of *renewing the note*, (B being then sick); that these drafts were afterwards taken up by the plaintiff who executed his own note to the bank; *Held*, that the indebtedness of B upon the original notes was not extinguished by the drafts of V; but V in his relation to the others was their surety and held their note for his own indemnity until relieved by the execution of plaintiff's note. *Dobson* v. *Chambers*, 142.

17. Where a substituted security is given at the instance and for the benefit of a debtor, the liability of the debtor is not destroyed, but is transferred to him who gives such security. *Ibid.*

18. The provisions of the "act concerning Inspector of lumber in Wilmington" (Priv. Acts 1874-5, ch. 155) are for the benefit of the vendor; and a sale of timber upon an inspection and measurement not in accordance with the act, the vendor making no objection thereto, is binding upon him. *McNeill* v. *Chadbourn*, 149.

(Observations by SMITH, C. J., upon the necessity of a "statement of the case" in a record sent up to this Court on appeal.) *Ibid.*

19. The defendants directed the agents of the plaintiffs to order certain cotton bagging to Charlotte, with the understanding that the defendants should accept and pay for the same if it suited them in quality and price. The bagging was attached *in transitu* at Portsmouth, Va., by R & Co. to satisfy a claim held by them against the agent of the plaintiffs. Defendants intervened, by leave of Court, in the attachment proceeding, and claimed the property as theirs. The controversy with R & Co. was finally settled by their paying to defendants a certain for their interest in the property; *Held*, that the transaction amounted to a conversion by defendants of the plaintiff's goods entitling the latter to a recovery. *Sever* v. *McLaughlin*, 153.

Held further, that the Court should have so instructed the jury instead of leaving it to them to decide the matter by the testi-

mony of one of the defendants as to what *he* meant by his conduct in representing the firm. *Ibid.*

20. A judgment suffered by one of several joint obligors on a sealed instrument for the payment of money maturing before the adoption of the C. C. P. Title IV. being a proceeding *in invitum*, is not such an acknowledgment by the judgment debtor of a *willingness* to pay, notwithstanding the statutory presumption of payment, as will bind his co-obligors. *Lane* v. *Richardson*, 159.

21. Where the plaintiff sues upon a special contract involving the performance of reciprocal acts between himself and the defendant, he must aver and show a readiness and willingness to perform on his part. Where the contract has been abandoned on both sides the innocent losing party will be driven to a *quantum meruit* or some other form of action founded upon a disaffirmance of the special agreement. *Jones* v. *Mial*, 164.

22. Where the defendants' intestate endorsed to the plaintiff for value, a bond which had been executed to him by one member of a firm in the name of the firm; *It was held*, in an action on the bond against the administrators of the endorser, that they were *estopped* from setting up any infirmities in the bond. *Henderson* v. *Lemly*, 169.

23. A *parol* agreement between A and B, that A will buy B's land at execution sale and that B may subsequently have the land at the price bid with interest, is void under the statute of frauds, in the absence of any equitable element in B's favor. *McKee* v. *Vail*, 194.

24. In such case B can not complain that A acted as deputy sheriff in the appointment of appraisers of his land before the sale, there being no allegation of fraud. *Ibid.*

25. The rule that equity will not compel a specific performance of a contract not founded on a valuable consideration, is confined to executory contracts or promises which rest *in fieri*. *Hodges* v. *Spicer*, 223.

26. In an action on a note for a certain sum solvable in cotton at a certain price per pound, the plaintiff is entitled to recover as damages for the non-delivery of the cotton, the market value of the quantity of cotton deliverable under the contract at the time the same ought to have been delivered. *Whitsett* v. *Forehand*,, 230.

27. On the trial below, it appeared that plaintiff's intestate, a postmaster, in June, 1861, had in his hands a certain sum of money belonging to the United States and paid it to the defendant to

whom the United States Government was indebted for services as mail carrier, in part discharge of the debt; after the war the defendant collected from the United States payment in full for all his services up to June, 1861, and the plaintiff's intestate was compelled to account for and pay to the United States the amount paid by him to defendant; *Held*, that plaintiff was entitled to recover. *Bahnsen* v. *Clemmons*, 556.

See Action to recover land 3; Bankruptcy 6; Deed 2; Evidence 6; Guaranty; Interest 1, 2; Landlord and Tenant 1; Note 1.

CONTRIBUTION—See Executors 3.

CONVERSION—See Contract 19.

CORPORATIONS—See Supplemental Proceeding.

COSTS:

Where, in an action to recover damages resulting from cutting a ditch, the title to the land came in controversy and on motion of plaintiff a survey was ordered and made, and on the trial the surveyors were summoned as witnesses for plaintiff but were not introduced by him or tendered to defendant, nor was the plat put in evidence, but the defendant examined them and introduced the plat; *It was held*, the plaintiff having obtained a verdict, that the costs of the survey and the witness fees of the surveyors should be taxed against the defendant. *Porter* v. *Durham*, 596.

COUNTERCLAIM:

1. The assignee of a note past due takes it subject to all counterclaims in favor of the maker and against the payee accruing before notice of the assignment. *Whedbee* v. *Reddick*, 521.
2. Where a legatee borrows from executors the money of their testator and gives his note for its repayment, he may set up as a counter-claim against such note, the amount due him from the estate of the deceased, and is entitled to an account to ascertain that amount. *Ibid.*
3. Under C. C. P. § 105, a plaintiff may not only *reply* to a counterclaim, but may allege "new matter" which has no connection with the matter alleged in the complaint or the new matter alleged in the counter-claim, the only requirement being that it shall not be inconsistent with the complaint. *Boyett* v. *Vaughan*, 528.

4. The plaintiff brought suit before a Justice for $105, due by account; the defendant pleaded a counter-claim for $200, due by note for part of the purchase money for a tract of land; judgment was rendered for defendant from which plaintiff appealed; in the Superior Court plaintiff was permitted to reply to the counter-claim, alleging an indebtedness of defendant of $332, upon a *parol* contract to pay plaintiff so much per acre for what the land should fall short of its estimated quantity; and plaintiff obtained judgment for $200, having remitted the excess of his claim above that amount; *Held*, not to be error. *Ibid.*

See Executors and Administrators, 22.

COUNTIES AND COUNTY COMMISSIONERS:

1. Where the county of Dare was formed out of parts of Currituck and other counties, and the act of assembly creating the county provided that the portion of its citizens taken from Currituck county should not be released from their portion of the outstanding debt of Currituck; *It was held*, that a judgment obtained against the county of Dare for such proportionate share should be paid by assessment upon *that portion of the territory of Dare taken from Currituck. Com'rs of Currituck* v. *Com'rs of Dare*, 565.
2. In the absence of legislative provision, neither the county of Dare nor that portion taken from Currituck would be liable for any portion of such debt. *Ibid.*

See Roads 1, 2.

COUNTY TREASURER—See Parties 3; Pleading 3.

COURSE AND DISTANCE—See Boundary.

COVENANTS—See Landlord and Tenant 3.

CREDITOR—See Supplemental Proceeding.

CREDITOR'S BILL—See Jurisdiction 1.

CREDITOR'S LIEN—See Executors 7.

DAMAGES—See Contract 5, 7, 10, 11, 26; Injunction 3; Practice 16, 17, 51; Roads 5.

DEBT OF COUNTY—See Counties.

DECLARATIONS—See Evidence 8, 10, 11, 12, 14, 15.

DEED.

1. The rule, that the recital in a deed, that the purchase money for the land conveyed has been received, is conclusive and can not be contradicted by *parol* evidence, has no application to cases of fraud. *Powell* v. *Heptinstall*, 206.
2. Where plaintiff and defendant compromised certain disputed matters for a definite sum to be paid by plaintiff in land at a fixed price per acre; and plaintiff's brother and the defendant fixed up the papers, including the deed, in plaintiff's absence, who signed the deed when presented to him, the receipt of the purchase money being therein acknowledged; and afterwards plaintiff ascertained that his brother and defendant had fraudulently included in the deed land worth fifty dollars more than the compromised debt; *It was held*, that plaintiff was entitled to recover of the defendant the amount overpaid. *Ibid.*
3. A call in a deed for a line "beginning at the north corner of R's store," where the store stands squarely east and west and has two north corners, is a latent ambiguity to be explained by *parol* testimony. *Lawrence* v. *Hyman*, 209.
4. Where A executed deeds of gift to B and C, his two sons, and the deed to B was lost before registration, and afterwards by arrangement C conveyed his land to B, and A executed a deed to C for the land orignally conveyed to B and in substitution for the first deed, reserving to himself a life estate therein;

   It was held, that if the original deeds to B and C were valid as to creditors when made, no subsequent exchange between them would affect the rights of creditors; *and further*, that the deed to C relates back to the date of the deed to B which was lost, notwithstanding the reservation therein of a life estate by A. *Hodges* v. *Spicer*, 223.
5. In such case, upon an issue as to the validity of the deeds against creditors, the inquiry as to whether or not the grantor reserved property sufficient and available for the satisfaction of his debts, should be confined to the date of the original deeds. *Ibid.*
6. In such case, creditors of A can not complain of the reservation of a life estate by him in the second deed. *Ibid.*
7. A reservation in a deed that the grantor "is to retain possession of the above described lands during his natural life *or so*

long as he may desire it for his own use and benefit" confers a life estate on the grantor. *Ibid.*

8. Where the grantees under a deed of gift were present at a sale of the land under execution against the grantor and made no claim to the land: *It was held*, that they are not thereby estopped from asserting their title. *Ibid.*

9. A deed conveying land and describing it as "one tract of land lying and being in the county aforesaid, adjoining the lands of A and B, containing twenty acres more or less," does not constitute color of title, and possession under it is not adverse. Such description is insufficient and cannot be aided by parol proof. *Dickens* v. *Barnes*, 490.

See Boundary; Evidence; Husband and wife, 11; Judge's Charge 2, 3; Practice 7; Registration 2; Trusts.

DEMURRER—See Executors and Administrators 14; Official Bond 1; Pleading 3, 5; Practice 34.

DESCRIPTION OF LAND—See Boundary; Deed.

DEVISE—See Executors and Administrators, 2, 3, 6, 7, 20, 21.

DISABILITY—See Adverse Possession 1; Statute of Limitations 6.

DISCRETIONARY POWER—See Practice 18, 19.

DISSENTING OPINIONS—See *Bank* v. *Williams*, 129, READE, J. *Boyette* v. *Vaughan*, 528, SMITH, C. J. and BYNUM, J. *Dawson* v. *Hartsfield*, 334, FAIRCLOTH, J. *Haywood* v. *Haywood*, 42, BYNUM and RODMAN, J.J. *Jones* v. *Mial*, 164, SMITH, C. J. *Mizell* v. *Simmons*, 182, SMITH, C. J. *Oldham* v. *Kerchner*, 106, SMITH, C. J. *Straus* v. *Beardsley*, 59, RODMAN, J.

DISTRIBUTIVE SHARES—See Trusts 2.

DIVORCE AND ALIMONY:

Under Bat. Rev., ch. 37, § 10, a wife is entitled to alimony *pendente lite* when she is a *party* to an action for divorce: *Therefore* where the husband plaintiff alleged adultery, and the wife defendant denied the same and asked for a divorce *a mensa et thoro* alleging cruel and inhuman treatment, and the

Court below granted an order for alimony *pendente lite; Held* not to be error. *Webber* v. *Webber*, 572.

DUE DILIGENCE—See Guaranty 2, 3.

DURESS:

Duress can not be predicated of compulsion to discharge a legal duty. *State* v. *Davis*, 603

See Guardian and Ward 6.

ELECTION—See Landlord and Tenant 6; Legacy 1, 2.

ELECTION OF MUNICIPAL OFFICER—See Town and Cities.

ENDORSER—See Contract 22.

EQUITABLE ASSIGNMENT—See Contract 13.

EQUITY OF REDEMPTION—See Mortgage 5.

ERRONEOUS JUDGMENT—See Practice 9.

ESTOPPEL—See Contract 22; Deed 8; Landlord and Tenant 2; Mortgage 8.

EVIDENCE:

1. Where there was a conflict of testimony between two witnesses and it appeared that one (an old person) had had an attack of paralysis; *Held*, that evidence of an expert that "paralysis in old persons has a tendency to impair the mind" was admissible. *Lord* v. *Beard*, 5.

2. Where there was a conflict of evidence as to whether a certain deed had been executed to the defendant by B, a witness for plaintiff, and a letter from one of the defendant's witnesses was introduced as contradictory of her testimony that such deed had been executed; *Held*, to be error for the Court to charge "that it was for the jury to say whether the letter was inconsistent with any idea that B had made any deed for the premises to the defendant." The only effect the letter could have would be to weaken or discredit the testimony of the witness; it was not admissible as evidence that B had not made a deed to defendant. *Ibid.*

3. Testimony which merely raises a conjecture or suspicion of a controverted fact should not be submitted to the consideration of a jury. *March* v. *Verble*, 19.

4. Where plaintiff sues defendant's intestate for the value of a bull alleged to have been sold by the former to the latter in a certain year, it is competent for the plaintiff to prove by his own oath the value of the bull, and that he had owned but one such animal since the war. This is not evidence of a transaction or communication with a person deceased, but of a substantive and independant fact. *Ibid.*

5. On an appeal to the Superior Court from a Justice's judgment, parol evidence is admissible to explain the intent and meaning of an entry on the Justice's docket. *Evans* v. *Williamson*, 86.

6. To charge one with a liability, positive and direct evidence of a previous request is not always attainable and is not required; *Therefore*, where it appeared that the plaintiff had purchased certain stock from B and W, partners, and it was in evidence that B had said on the day of sale that "he and W owed a large debt in bank and had a chance to make a large payment in stock;" that the plaintiff and B and W were seen together in conversation and B afterwards said that "he had got $3000 for his stock;" that afterwards, B being then deceased, the plaintiff took up the note of B and W by executing to the bank his own note, to which W was a surety; *It was held*, in an action against B's administrator, that there was sufficient evidence to warrant the jury in finding that the plaintiff was requested by B and W to take up their note. *Dobson* v *Chambers*, 142.

7. Where the land in dispute was conveyed in trust for use, as the site of a church, "so that the congregation of said church may at all times enjoy the privilege of divine worship therein &c.;" *It was held*, that a member of the congregation was not such a party in interest in an action affecting the title to the land as to be debarred, under C. C. P. § 343, from testifying to the declarations of a deceased person. *Lawrence* v. *Hyman*, 209.

8. In such case, the declarations of the grantor in said deed of trust as to the true corner, are not admissible in evidence on behalf of the plaintiff (trustee in said deed) the defendant not claiming through him, and not being present when the declarations were made. *Ibid.*

9. Nor, in such case, is the plaintiff trustee a competent witness (under C. C. P. § 343) to prove a communication made to him by a person at the time of trial deceased. *Ibid.*

10. In an action involving the validity of a deed of trust, where the trustor is dead and his estate insolvent, the son of the trustor is a competent witness as to his declarations concerning the trust; the disqualification of the son under C. C. P. § 343 is removed by the insolvency of his father's estate. *Gidney* v. *Logan*, 214.

11. The declarations of a trustor at the time of making the deed and just prior thereto and in contemplation thereof, are admissible in evidence; and also his declarations after the deed and while the property was in his possession are admissible to prove and qualify the fact and purpose of such possession. *Ibid.*

12. The declarations of a grantor, made at a time subsequent to the execution of the deed, are not evidence against the grantee. *Hodges* v. *Spicer*, 223.

13. Upon the trial of an issue as to whether an administrator had certain notes and accounts against the estate of his intestate at the time he rendered his account, and whether the fund in his hands was applied to their payment; *Held*, that the testimony of a witness that "he had seen the notes and accounts due the administrator but they are not on file," was not admissible, the notes and accounts not being produced and there being no evidence of their loss or destruction or that search had been made for them. *Williams* v. *Wooten*, 414.

14. The declarations of a mortgagor after the execution of the deed are not admissible to prove an alleged fraud between him and the mortgagee, in an action wherein the mortgagee is plaintiff and a third party is defendant (involving the rights of the plaintiff under the deed). *Burbank* v. *Wiley*, 501.

15. Such declarations are only evidence against the mortgagor himself in a proceeding between him and such third party. *Ibid.*

16. Business entries of deceased persons, (as the field-notes of a surveyor), made in the line of their duty, are only admissible in evidence when they are shown to be *original* and *cotemporaneous* with the facts they record; and these requisites must be established by evidence other than what may be derived from the entries themselves. *Ray* v. *Castle*, 580.

17. The former statements of a witness, made without the sanction of an oath, and coinciding with those made on the stand, may be admitted in evidence, if he is impeached, to sustain the personal *credibility* of the *witness*, but not for the purpose of confirming his *statement* as to the *facts* sworn to by him on the trial; *A fortiori* such testimony is not admissible to confirm the statement of another witness testifying to the same effect. *State* v. *Parish*, 610.

18. Where a certain state of things is once proved to exist, the law presumes its continuance until a change is shown; *Therefore*, where a witness, called to impeach the character of another witness, offers to speak as to the general character of the witness attacked as it existed some two or three years before the trial, such evidence is not too remote, and its rejection is error. *State* v. *Lanier*, 622.

19. It is a general rule, applicable alike to criminal and civil causes, that exception to evidence must be taken in apt time on the trial, or its admission is not assignable for error. *State* v. *Ballard*, 627.

20. This rule, however, is subject to an exception (at least in criminal causes) where the evidence is made incompetent by statute. In such cases it is the duty of the Judge, on his own motion, to disallow the evidence. *Ibid.*

21. The question as to whether or not an infant witness has sufficient mental capacity and sense of moral obligation to testify in a cause, is one of fact to be determined by the Court, and cannot be reviewed on appeal. *State* v. *Edwards*, 648.

See Action to recover land 1, 2, 3; Bastardy; Contract 8, 13; Guardian and ward 2; Husband and wife 1. 2; Judge's Charge 4; Practice 24, 48; Trial 1; Witness.

EXCEPTIONS—See Evidence 19; Practice 47, 49, 50.

EXECUTORS AND ADMINISTRATORS:

1. Where, in pursuance of a decree, upon final settlement of a testator's estate and more than two years after his death, an executor paid legacies to parties entitled without notice of any outstanding debt of his testator and took good and sufficient refunding bonds from the legatees; *It was held*, in an action upon a guardian bond to which the testator was surety, that the executor was not liable. *Badger* v. *Daniel*, 372.

Held further, that the acceptance of a legacy, in such case, does not operate to discharge the testator's estate from a liability incurred by his suretyship on the bond of the guardian of such legatee, to the extent of sums received by the guardian *as guardian*; but the value of the legacy so received and such other sums as may be made out of other legatees must be applied to its discharge, before subjecting lands in possession of devisees of the estate. *Ibid.*

Held further, 1st—That the act (Rev. Code, ch. 46 § 24) in reference to refunding bonds is intended only for the benefit of creditors. 2nd—Where the aggregate penalties of such bonds

are sufficient in the discretion of the executor to meet debts probably outstanding, *it seems*, that he has fulfilled the requirement of the statute. 3rd—Where the distribution of a decedent's estate is decreed in a proper proceeding for that purpose, the Court should fix the amount of penalties of such bonds. *Ibid.*

2. Where a legatee (and devisee) executed a refunding bond upon receipt of his legacy, and sold and conveyed land devised to him within two years after the testator's death; *Held*, (1) That his surety was liable primarily (to the extent of the terms of such bond) as between him and the purchaser of the land, for an outstanding debt of the testator, whether evidenced by judgment or not. (2) Such purchaser holds the land as the devisee did; *and, therefore*, the conveyance to him is void and the land liable as assets for the payment of the debt; and if he or the devisee sell, after the two years, his vendee (without notice of the debt and for a valuable consideration) acquires an unencumbered estate, but the same liability attaches to the price paid him, as did to the land. (Bat. Rev. ch. 45 § 136.) *Ibid.*

3. Each devisee or heir is liable for the debt of his devisor or ancestor in proportion to the respective values of the land; and the whole debt to an amount not exceeding the value of the devise to one, may be made out of him, he being entitled to contribution from the others, which may be decreed in an action where they are all parties. *Ibid.*

4. And each devisee, heir, &c., is a surety (to the extent of what he receives) for the other sharers in the estate, to the creditors thereof. *Ibid.*

5. An executor is not chargeable with the value of slaves destroyed as property by emancipation while in his possession; nor is a legatee, to whom they were delivered and retained. *Ibid.*

6. The liability of a devisee for the payment of the devisor's debt is contingent upon the insufficiency of the personal estate; and *it was held*, in an action to subject the devised land and before such insufficiency was ascertained, that the plea of the statute of limitations was no defence. *Ibid.*

7. One Joyner by his will devised a certain lot of land to M. D. and upon her death the lot was sold in 1863 by order of Court, and the purchaser failing to pay, it was re-sold in 1871 and bought by defendant's intestate, who executed two notes with defendant H as surety for the purchase money and the sale was confirmed; the notes were delivered to G as receiver of the

estate of J. J. D. and W. A. D. Jr., heirs of M. D.; in 1876, G by order of Court transferred the notes to the survivor J. J. D., who was also administrator of W. A. D. Jr. and he endorsed them to the plaintiff for value. In 1871 one B and wife and others brought suit against Joyner as surety on the guardian bond of one Daniel, all the devisees of Joyner being at different times made parties; in 1877, the Court below adjudged that the proceeds of the sale of land devised to M. D. was real estate in the hands of J. J. D. and he took no part as administrator of W. A. D. Jr., and that it was assets liable to the claim of B and wife and others, who recovered a large judgment; the plaintiff had no notice of the existence of this action when he purchased the notes; *Held*,

(1) That the defendant's intestate acquired by his purchase a right to have the land conveyed on payment of the purchase money. *Winfield* v. *Burton*, 388.

(2) That J. J. D., as representing the devisee M. D., is liable to a personal judgment against him for the value of the land, in favor of any creditor of Joyner who can not get payment out of personal assets. *Ibid.*

(3) That the *quasi* lien of a creditor of an estate on the land of the decedent is destroyed by a sale after two years, leaving him only a personal claim on the heir, and the notes given for the purchase money are not subject to the *quasi* lien that the land was.

(4) That J. J. D. was not a trustee for the creditors of Joyner, and the notes in his hands could not have been seized, and much less in the hands of his assignee, whether he bought with notice of the creditor's claims or not, and therefore that the plaintiff is entitled to recover. *Ibid.*

8. It is not negligence in an administrator to sell slaves for division in March, 1861, under an order of Court in an *ex parte* proceeding instituted to that end by the administrator and distributees. *Furr* v. *Brower*, 408.

9. Where, after such a sale, the guardian of the distributees, who were infants, commenced a suit against the administrator for the funds arising therefrom, and in April, 1863, obtained a judgment, the administrator was justified in collecting the purchase money in confederate currency, such being the only circulating medium; and the receipt of the guardian for the same after its payment into Court, is a complete discharge of the administrator. *Ibid.*

10. Where, in the settlement of an estate, the administrator dis-

bursed a much larger sum during the war in confederate currency than he received during that time, (nearly the whole amount of receipts being before and since the war,) and no explanation is given as to why or how he had in his hands $1000 in confederate currency in 1874, which he advanced plaintiff as part of his distributive share; *It was held*, that in the settlement of his account the administrator should only be credited with the actual value of the confederate currency so advanced. *Williams* v. *Williams*, 411.

11. *Held further*, that in such settlement the plaintiff (distributee) should be charged only with the value of such confederate currency in good money as of the date of said advancement. *Ibid.*

12. As a legal proposition, it is not the duty of an administrator here to take out letters of administration in another State in all cases where a debt there, may be due the intestate; but his duties, as those of all other trustees, must be determined by the exigencies of each case; and where no attempt of any kind was made to collect a bond on a solvent non-resident living in an adjoining county in Virginia about a day's journey, by private conveyance, from the residence of the administrator, and where no excuse except the non-residence of the debtor is given for such delinquency by the administrator, he is guilty of such negligence as will render him liable for the uncollected portion of the debt. *Williams* v. *Williams*, 417.

13. Where, upon the petition of an administrator, the land of his intestate is sold for assets by a commissioner appointed by the Court, and the administrator purchases for his own use and benefit, the heirs and other persons interested in the disposition of the realty have their election to treat the sale as a nullity, or to hold the administrator responsible for the actual value of the land. *Froneberger Lewis*, 426.

14. Under Bat. Rev. ch. 45, § 71, only the interest of a deceased debtor in land possessed by him, or which he may have conveyed for the purpose of defrauding creditors, is subject to sale by an administrator for assets;

Therefore, where the plaintiff instituted proceedings in the Probate Court, alleging that he had obtained and docketed a judgment against defendant's intestate during his life-time, and that thereafter the intestate had sold certain real estate to the other defendants for value, and asked that a reference be had to ascertain the value of the lands so sold, that he recover of the defendants an amount in proportion to the value of the respective tracts, and on their failure to pay that the admin-

istrator proceed to sell, &c.; *It was held*, that a demurrer to the complaint was properly sustained. *Heck* v. *Williams*, 437.

15. A testator, who in his life time had made unequal advancements to his children, by his will bequeathed certain amounts to them, with a view to equality, payable in cash or property at the election of the executor, without stating when they should be paid; the remainder of his estate was given to his wife for life, and at her death the residue was to be divided into as many shares as he might have children then living; at the time of his death the testator had sufficient personal property including slaves to pay his debts and legacies, but the solvent credits and monies belonging to the estate were exhausted in payment of debts and expenses, except certain shares of bank stock bequeathed to the executor (a child and legatee) but charged with the payment of $710 into the residuary fund; the slaves at his death were worth much more than the amount of the legacies; after his death the slaves and other personal property remained in the possession of the widow *with the approval of the legatees*, until the slaves were emancipated; the executor (now deceased) offered to pay the legacy to one of the legatees, which was declined, and to another he paid a part; no effort was made by the legatees to compel a payment of the legacies until after the slaves were emancipated; *Held*, (1) That the legacies are not a charge upon the land of the testator:
(2) That the estate of the executor is not liable for legacies:
(3) That the estate of the executor is liable for $710, with interest from the death of the widow, to be paid into the residuary fund.
(4) That the executor is entitled to commissions, it being found that he acted in good faith. *Perkins* v. *Caldwell*, 441.

16. Where a will gave certain legacies and devises to a widow in lieu of dower, which amounted to less in value than her dower; *It was held*, that such legacies and devises were not assets liable for the debts of the testator. *Smith* v. *Smith*, 455.

17. Where cotton belonging to an estate was shipped by the executors to a firm of commission merchants in good repute, who preferred claims against the proceeds arising out of their transactions with the testator and also with the testator's widow, and while the matter was still unsettled the firm failed; *Held*, that the executors are not liable to the creditors of the estate for the loss. *Ibid*

18. But if while the demands of the firm are being resisted by the executors, and are still unadjusted, the executors ship other

cotton to the same firm, which is not then notoriously insolvent, and the proceeds are lost; *Held*, that their previous dealings should have put the executors on their guard and they are liable to the creditors for the loss. *Ibid.*

19. For effecting an arrangement whereby the creditors of an estate took $49,500 worth of land in payment of their claims, the executors were allowed two and one half per cent commissions. *Ibid.*

20. Where all the devisees under a will, including the plaintiffs and one of the executors, took the lands devised to them and for two years received the rents and profits, and the estate proving insolvent, then surrendered the same; *Held*, that as between the plaintiffs and said executor, the executor was not chargeable with the rents. *Ibid.*

21. Where a testator was a prudent business man and his indebtedness was apparently small as compared with his estate, and the will set aside enough property in his judgment to pay his debts, and where the devises were specific (farms) and already in possession of the devisees; and when the value of testator's estate was so greatly impaired by the effects of a financial crisis and an inability to collect debts due the estate, that it proved insolvent; *Held*, that the executors have a right to call upon the legatees under the will to refund. *Ibid.*

22. Where, the plaintiff having received a legacy of stock, &c., sold the same to defendant H, and received in part payment a note of the testator and sued upon it, and the executors answer, for the reasons stated above, that they have nothing to pay with except the plaintiff's legacy; *Held*, that the equity of the executors to compel the plaintiff to refund the legacy is a good counter-claim to the plaintiff's demand. *Ibid.*

See Counter-claim 2; Evidence 13; Husband and wife 8; Jurisdiction; Probate Court; Trusts 1, 5.

EXPERT—See Evidence 1.

EXPRESSION OF OPINION BY JUDGE—See Practice 53.

FACTOR'S LIEN—See Contract 14.

FALSE PRETENCE—See Judge's Charge 5.

FINDING OF FACTS—See Practice 23.

FORMER ACQUITTAL—See Indictment 1, 2.

FRAUD—See Contract 23, 24; Deed 1, 2; Evidence 14, 15; Judgment 1; Practice 26, 43; Trusts 4.

FREE-TRADER—See Husband and Wife 7.

GENERAL CHARACTER—See Evidence 18.

GUARANTY:

1. The distinction between a guaranty for the payment of a debt and a guaranty for the collection of the same is clear and well defined. The former is an absolute promise to pay the debt at maturity if not paid by the principal debtor, and the guarantee may bring an action on default of payment at the day named against the obligor. The latter is a promise to pay the debt upon the condition that the guarantee shall diligently prosecute the principal debtor without success. *Jones* v. *Ashford*, 172.
2. What amounts to due diligence in any given case is a question of law for the Court. *Ibid.*
3. The diligent and honest prosecution of a suit to judgment, with a return of *nulla bona* to the execution issuing thereon, has always been regarded as one of the extreme tests of such diligence, and this Court adopts it as such. *Ibid.*
4. An agreement in writing "to guaranty the payment" of a certain note to a party named, "and in case she fail to recover the money on said note," to pay the principal, interest and costs thereon, is merely a guaranty for the collection of the note. *Ibid.*

See Contract 1.

GUARDIAN AND WARD:

1. An order by a Superior Court clerk in a cause pending before him for the removal of a testamentary guardian, where it is not alleged or found as a fact by the clerk that the estate of of the ward has been wasted, or that the guardian is insolvent, so that the ward would be unable to recover the balance due on a final settlement, is improperly made, and will be set aside upon proceedings properly instituted to that end. *Sanderson* v. *Sanderson*, 369.
2. A judgment obtained against a guardian in 1871 in favor of his

ward, is *conclusive* evidence against him and the sureties upon his bond of the amount of his indebtedness to the ward at that time. *Badger* v. *Daniel*, 372.

3. Where a guardian sold land which was devised to his ward to J for $10,000, and afterwards bought it back from J, paying for it with his ward's money; and the land was subsequently sold under a decree to re-imburse the ward, and the ward became the purchaser at $8,000; *Held*, that the price bid by the ward was a proper credit to the guardian upon the charge made against him for the original price.

4. In an action by a ward against the surety on the bond of his deceased guardian, it is no defence for the defendant that assets came into the hands of the administrator of the guardian sufficient to pay the amount due the plaintiff which were wasted by him, and that he and the sureties on his administration bond are insolvent. *Humphrey* v. *Humphrey*, 396.

5. The conversion by a guardian into confederate currency of the bank bills and solvent notes of his ward, which came into his hands before the war, requires explanation, without which it will be deemed to import negligence. *Sudderth* v. *McCombs*, 398.

6. The pressure of public opinion unaccompanied by peril of life, limb, or great bodily harm, is not such *duress* as will excuse the conversion by a guardian of his ward's estate into depreciated currency or securities. *Ibid.*

See Executors and Administrators 1, 9; Practice 5, 6.

HEIR—See Executors and Administrators 3, 4, 7, 13; Husband and Wife 12; Vendor 2.

HOMESTEAD—See Action to recover land 5.

HOMICIDE:

Where, upon a trial for homicide, the only evidence relied upon by the State to connect the prisoner with the offence, is his own confessions, and those confessions tend to disclose a case of mutual combat upon sudden provocation between the prisoner and the deceased; *It was held*, to be error to exclude that view of the case from the jury, however much it may conflict with opposite theories arising from other portions of the evidence. *State* v. *Jones*, 630.

HUSBAND AND WIFE:

1. In the absence of proof to the contrary, the rules of the common law relative to marriage are presumed to obtain in all christian countries, and especially in the States of the American Union. *Jones* v. *Reddick*, 290.
2. By the law of North Carolina, which is in conformity to the common law, reputation, cohabitation, and the declarations and conduct of the parties are competent evidence of marriage in questions of inheritance. *Ibid.*
3. A wife is entitled to the possession and control of her separate estate, to manage the same and receive the income arising therefrom, free from the control or interference of her husband. *Manning* v. *Manning*,, 293.
4. In an action by a wife against her husband to recover the possession of her lands of all which he had taken possession and control and was cultivating solely for his own use, and damages for withholding the same; *It was held*, that the action would lie and that the plaintiff was entitled to the relief demanded. *Ibid.*
5. But in such case, the husband's marital right of occupancy can not be impaired; his right of ingress and egress to the dwelling and society of his wife continues; and a writ of possession following a judgment must be so framed as to put the wife in possession without putting the husband out. *Ibid.*
6. A action can not be maintained by a husband against his wife and her agent, for an account of the dealings of the agent in the management of the wife's separate estate. *Manning* v. *Manning*, 300.
7. A wife (whether a free-trader or not) is entitled under the constitution (Art. X, § 6, and Bat. Rev. ch. 69, § 29) to recover and hold to her own use, her separate property and also the income derived from it; and agents appointed by her. whether before or after marriage, must account with and pay to her, what they have received either before or after her marriage. *Ibid.*
8. Where a father insures his life for the benefit of his children, one of whom (a daughter) marries and dies without issue, the husband of the deceased daughter is entitled, as her administrator, to her share of the money arising from the policy of insurance upon the death of the father. *Conigland* v. *Smith*, 303.
9. Where husband and wife join in a mortgage of lands consisting in part of the wife's separate estate to secure the husband's in-

dividual debts, a judgment creditor of the husband in no way connected with the mortgages is not entitled to an order of Court directing a sale of the wife's land in the first instance, to satisfy the mortgage creditor, thereby exonerating the husband's land and leaving it open for the satisfaction of outside debts. *Shinn* v. *Smith*, 310.

10. Where a marriage took place prior to the adoption of the constitution of 1868, and in 1871 the wife acquired certain personal property, it vested in her as her separate estate, free from "the debts, obligations or engagements of her husband." *Holliday* v. *McMillan*, 315.

11. Where a married woman purchased certain real estate taking title to herself, and borrowed money with which to pay the purchase money, and to defray necessary family expenses and for carrying on her farming operations on other lands, and to secure the sum borrowed executed with her husband a deed of trust on certain land of her separate estate; *It was held*, that such deed of trust was valid. *Jeffrees* v. *Green*, 830.

12. The rents of a wife's land (prior to the adoption of the constitution of 1868) accruing in the life-time of the wife, or of the husband surviving her and having an estate by the curtesy for life, belong to the husband and not to the heir of the wife; he is entitled to the land at the death of the husband;

Therefore, where land was sold by a clerk and master in 1853 under a decree for partition among tenants in common, the husband and wife being entitled to a share in right of the wife; and the wife died in January, 1868, and the husband in December, 1873, without having received said share; *It was held*, in an action by the heir of the wife upon the bond of said clerk, that he was entitled to recover his share of the principal money realized by said sale, with interest from the death of the husband—the proceeds of sale standing as and for the land, and the interest thereon as and for the rent. *Matthews* v. *Copeland*, 493.

See Witness 2.

INDICTMENT:

1. A verdict of acquittal on an indictment for a misdemeanor procured by the trick or fraud of the defendant is a nullity, and the defendant can be again put on trial for the same offence *State* v. *Swepson*, 632.

2. The defendant was indicted for cheating the State, and a motion was made in the Court below by defendant's counsel (he

not being present and the Solicitor for the State not being ready for trial) upon an allegation that the matter had been compromised, that a verdict of "not guilty" should be entered; His Honor thereupon directed a jury to be impannelled and a verdict of "not guilty" to be entered and refused to permit an appeal to this Court, and also refused to permit a statement of the facts to be made part of the record; thereafter His Honor went out of office. Upon a motion in this Court that a mandamus issue to the Court below to cause inquiry to be made into the truth of the alleged facts, and if true, to cause the defendant to be again put on trial; *It was held*, that this Court has no jurisdiction in the premises; the remedy is in the Court below where the defendant can be again put on trial and the truth of the facts alleged by the State inquired into upon a plea of former acquittal. *Ibid.*

3. An indictment for a nuisance by profanely swearing in a public place should set forth:
(1) That the offence was committed "in the *presence* and *hearing* of divers persons then and there assembled," and the general conclusion "*ad communem nocumentum*" is not sufficient.
(2) That "the acts were so repeated in public as to have become an annoyance and inconvenience to the public."
(3) The profane words alleged to have been used, so that the Court may decide as to their quality. *State* v. *Barham*, 646.

4. An omission of any of these specifications is a fatal defect in the indictment, for which judgment will be arrested. *Ibid.*

5. It is no ground for an arrest of judgment that an indictment charging only a common law offence, concludes "*contra formam statuti*," and "against the peace and dignity of the State." The conclusion against the statute may be rejected as surplusage. *State* v. *Bryson*, 651.

6. An indictment for disposing of mortgaged property under the act of 1873–'74, ch. 31, is fatally defective, if it fails to set forth the manner of disposition, and the name of the person receiving it in case of a transfer of possession. *State* v. *Pickens*, 652.

7. An indictment for larceny which describes the property stolen as "one pound of *meat*," &c., is fatally defective. *State* v. *Patrick*, 655.

8. Where an indictment for injuring a cow concluded at common law, and failed to charge the offence to have been committed "mischievously or from malice to the owner; *Held*, to be fatally defective. *State* v. *Hill*, 656.

9. An indictment for injuring live stock under Bat. Rev., ch. 32, §§ 94, 95, is defective, if it omits to conclude *contra formam statuti*, and to charge an unlawful intent—to drive the stock from the range, or to injure the owner. *Ibid.*

10. Upon the trial of an indictment for injury to live stock, *it was held* to be a variance:
Where the defendant was charged with injuring a cow, and the proof was that the animal injured was an ox;
Or where the property was laid in "L. S. and others," and the proof was that L. S. was the exclusive owner. *Ibid.*

11. In such case it is essentially necessary that there should be an averment describing the thing injured, and proof of ownership thereof.
(SUGGESTION--*Statutory offences.* It is not always sufficient to follow the words of the statute. The charge should be as specific as the proof adduced in its support must be.) *Ibid.*

INFANT WITNESS—See Evidence 21.

INJUNCTION:

1. An injunction bond is not void, under C. C. P. § 192 because it specifies no amount in which the signers to it are bound. *N. C. Gold Co.* v. *N. C. Ore Co.* 48.

2. An injunction will be dissolved when the answer and affidavits of defendant are full and complete, denying the whole equity of plaintiff, and are credible, exhibiting no attempt to evade the material charges in the complaint and affidavits of plaintiff. *Perry* v. *Michaux*, 94.

3. The defendant under an injunction or restraining order can only recover damages upon the dissolution of the one or the vacation of the other, by showing want of probable cause for the plaintiff's action, or malice in its legal acceptation as applicable to such cases. *Burnett* v. *Nicholson*, 548.

See Practice 16, 17.

INJURY TO LIVE STOCK—See Indictment 8, 9, 10.

INSOLVENT DEBTOR—See Arrest and Bail 4.

INSPECTOR—See Contract 18.

INSURANCE:

1. Where a policy of fire insurance covered a stock of "drugs and medicines," and contained a stipulation that the policy should be avoided "if the insured shall keep gunpowder, fire works, *saltpetre*, &c; *It was held*, that the prohibition was not against keeping saltpetre as a drug, but only in such manner or quantity or for such purpose as would increase the risk. *Collins* v. *Insurance Co.* 279.

2. Where in such case saltpetre was on hand as a part of the stock of drugs at the time the policy issued, being an article usually kept in drug stores, it was as a part of the stock insured, and although specially prohibited by the terms of the policy, the policy was not thereby avoided. *Ibid.*

3. Where, in an action to recover on a policy of fire insurance, it appeared that at the time of the issuing of defendant's policy, additional insurance upon the property was taken out by the plaintiff with the same agent in another company, the consent of defendant being endorsed upon its policy; and thereafter another company was substituted by the same agent in place of the second insurer; and that such substitution was known to defendant, and that no complaint was made against it either at the time or after the fire when defendant was attempting to effect an adjustment of the loss; *It was held*, that the fact that the substitution was made by defendant's agent with defendant's knowledge and without objection by defendant, constituted a waiver of the stipulation in its policy that no additional insurance should be placed upon the property insured, unless the consent of the company was endorsed upon its policy. *Ibid.*

4. Where the holder of a policy of insurance against fire complies substantially with all the requirements of the contract between himself and the insu ers, immaterial variations will not vitiate it. *Willis* v. *Insurance Co.* 285.

5. Where a fire-policy forbids the keeping by the assured of benzine, camphine "or any explosive," it is a question of fact for the jury whether or not certain alcohol kept in the store of the policy holder was an explosive under the particular circumstances of the case. At any rate, it can not be so considered in the absence of a finding to that effect. *Ibid.*

6. If such a policy authorize the keeping of kerosene of a certain quality, it will rest upon the insurers in case of a loss to show; (1) that the kerosene was not of that quality, and (2) that the fire originated or was influenced by the kerosene kept. *Ibid.*

7. An instruction by a policy holder to his agents not to interfere in case of fire unless the entire stock could be saved, in order that no dispute might occur with the insurers as to the amount of a loss, will not stand in the way of a recovery where it affirmatively appears that no efforts of the assured or his agents could have averted the loss. *Ibid.*

See Husband and Wife 8

INTEREST:

1. In an action by heirs-at-law against an administrator when the final account of the administrator showed a net balance in his hands due the 1st of Dec. 1858; *Held*, that the defendant is liable for interest from that date, it being more than two years from the death of the intestate and no reason appearing why the amount should have remained in his hands. *Bushee* v. *Surles*, 51.
2. A note, as follows, "On the 25th Dec. 1873, I owe and promise to pay G, *with legal interest*, the sum of &c. this 21st Oct. 1871," bears interest from its date. *Gholson* v. *King*, 162.

See Contract 12; Judge's Charge 5.

INTERLOCUTORY ORDER—See Practice 40.

IRREGULAR JUDGMENT—See Practice 13, 14, 27, 28, 29, 43, 44, 45.

ISSUES—See Contract 13; Practice 20, 22, 23, 52, 59.

JOINT OBLIGORS—See Contract 20.

JUDGE'S CHARGE:

1. The failure of a Judge to recite the testimony in his charge to the jury is not error, where it was agreed by the counsel on both sides that the testimony need not be recapitulated. *Wiseman* v. *Penland*, 197.
2. On the trial of an action involving the validity of a deed of trust only as to certain personal property therein conveyed, when the deed included both real and personal property; *It was held* to be error to submit to the jury an issue as to its validity in regard to the real estate, *Gidney* v. *Logan*, 214.
3. In such case, the Court below should have excluded from its charge to the jury, all consideration of any provision in the deed affecting the real estate. *Ibid.*
4. It is the duty and privilege of the jury to determine what *is*

the testimony in a cause as well as its weight and reliability; *Therefore*, when upon the disagreement of counsel as to what was testified by a witness, the Court stated that both the counsel were wrong, and added that he would so recapitulate the testimony that "it would be moral perjury for a juror to accept the statement of defendant's counsel," *Held*, to be an invasion of the province of the jury, and entitles the defendant to a *venire de novo*. *State* v. *Sykes*, 618.

5. A charge is erroneous which, in attempting to describe the offence of obtaining a signature by false pretences, as declared in Bat. Rev. ch. 32, § 67, omits to direct attention to the fraudulent intent of the defendant as a necessary ingredient of the crime. *State* v. *Austin*, 624.

6. While, in the absence of a prayer for instructions from counsel, omission of the Judge to charge in a particular way is not assignable for error, yet, if he should undertake to state the law, and in so doing, should neglect to mention an essential constituent of the offence charged, the defendant if convicted is entitled to a new trial. *Ibid.*

7. A failure of the Judge to instruct the jury, preparatory to a short adjournment pending the trial of a capital case, that they should not discuss the case among themselves or with third parties during the recess of the Court, is not sufficient cause for a new trial, where it does not affirmatively appear that an improper verdict resulted from such omission, or, at least, that the jury were tampered with. *State* v. *Edwards*, 648.

See Contract 5, 19; Evidence 2, 20; Practice 53.

JUDGMENT:

1. A judgment, in the absence of proper proof of fraud, must be presumed to have been fairly and regularly taken. *Wiseman* v. *Penland*, 197.

2. An agreement to take part of a debt in payment of the whole was *nudum pactum* before the act of 1874-'75, ch. 178, and where one pays a certain sum upon a contested debt in compromise thereof in case it shall afterwards be established, a finding by the jury that it never existed will entitle the payor to a judgment of restitution for the money advanced by him. *Fickey* v. *Merrimon*, 585.

3. Where counsel on both sides agree that the clerk may take the verdict of a jury, and afterwards such agreement is rescinded with notice to the clerk but not to the presiding Judge, a

judgment of the Court, rendered in ignorance of such rescision, is not irregular. *Ibid.*

See Bankruptcy 1; Contract 20; Guardian and Ward 2; Parties 4; Pleading 4; Practice 10, 12, 13, 14, 31, 41, 43, 44, 45.

JURISDICTION:

1. Where an action in the nature of a creditor's bill was brought by the plaintiff (a creditor of defendant's testatrix) to the Superior Court at term time, under § 6, ch. 241, Laws 1876-7, and after the institution of the action the defendant commenced a special proceeding in the Probate Court for the sale of the land of the testatrix for assets; *It was held*, that the Superior Court had acquired jurisdiction of the matter, and that the defendant should be restrained from further proceedings in the Probate Court. *Haywood* v. *Haywood*, 42.
2. Under Bat. Rev. ch. 45, § 73, and Laws 1876-7, ch. 241, § 6, there is not a conflict of jurisdiction between the Probate and Superior Courts in regard to the settlement of estates but the jurisdiction is concurrent. *Ibid.*
3. When there are Courts of equal and concurrent jurisdiction, that Court possesses the case in which jurisdiction first attaches. *Ibid.*
4. Prior to the act of 1876-7, ch. 251, a Justice of the Peace had no jurisdiction in cases of tort. *Krider* v. *Ramsay*, 354.
5. Under the constitution, art. IV § 12, and the acts of 1876-7, ch. 241 § 6, the Superior Court in term time has original jurisdiction to hear complaints against executors and administrators, demanding an account of their dealings and a settlement with the legatees or distributees. *Bratton* v. *Davidson*, 423.
6. Where an administrator fails to exhibit in Court his final account at the end of two years from his qualification, the distributees may bring suit upon his bond to a regular term of the Superior Court, alleging such failure as a breach, and calling for an account, without first seeking the account in the Probate Court. *Ibid.*
7. Courts of Probate have no power to provide for the payment of the debts of a lunatic contracted prior to the lunacy. *Smith* v. *Pipkin*, 569.
8. Where the existence of a debt, alleged to be due from a lunatic, is denied, a Court of Probate has no jurisdiction to try the question of debt or no debt. *Ibid.*
9. Under Acts 1876-7, ch. 241, § 6, the Superior Courts have con-

current jurisdiction with the Courts of Probate over lunatics and their estates. *Ibid.*

See Indictment 2; Practice 36, 37; Probate Court 2, 3, 4, 5, 6; Trusts 1.

JURY:

A statute exempting members of a fire company from jury duty in general, does not operate to discharge them from service as *talesmen*. The object of the law is to afford them leisure for the performance of their duty as firemen; and when their presence in Court demonstrates that their services are not required in the line of their employment, the reason of their exemption ceases. *State* v. *Willard*, 660.

See Evidence 6; Judge's Charge 4; Judgment 2; Practice 14, 15, 22; Trial 1.

JUSTICE OF THE PEACE—See Jurisdiction 4; Practice 36, 37.

LANDLORD AND TENANT:

1. One, at the time under a disability to contract, who enters upon land by permission of another claiming and acknowledged to be the owner, must return the possession to such owner as a condition precedent to denying his title. *Wilson* v. *James*, 349.
2. Where, in an action under the Landlord and Tenant Act, it appeared that the defendant, a slave, in 1863 entered into possession of the *locus in quo* as the tenant of plaintiff, and in 1865 refused to pay further rent and disclaimed being the plaintiff's tenant; *It was held*, that he was estopped to deny the plaintiff's title, and that plaintiff was entitled to recover *Ibid.*
3. If there are no covenants in a lease against sub-letting, the lessee may underlease, and if the under-tenant commits no br each of the covenants between the lessor and the lessee which would work a forfeiture of the lease and authorize an entry and dispossession of him by the lessor, an entry upon the land demised to the undertenant and a dispossession of him by the lessor is a trespass. *Krider* v. *Ramsay*, 354.
4. Where a tenant for years, after sub-letting to a third party, and before the underlease has expired, surrenders to the landlord, the latter is guilty of a trespass in entering upon the sub-lessee. *Ibid.*

5. In cases of sub-letting such as the above, there is no privity of estate or contract between the lessor and the under-tenant; and *therefore*, no action in substance *ex contractu* can be maintained for a wrongful entry by the landlord. *Ibid.*

6. A mortgagor of land left in possession (or his assignee) has the right to appropriate the profits arising therefrom to his own use, or to lease to another and take the accruing rent; and this right remains until divested by some positive interference of the mortgagee;

Therefore, where the plaintiff (assignee) agreed to sell said land to the defendant who was let into possession, and upon default of payment of the purchase money the plaintiff elected to treat the defendant as a tenant at a certain sum for rent, as provided in the contract of sale; and afterwards, the mortgagee sold and conveyed the land under a power in the deed to pay the original debt secured thereby;

It was held, in an action for the rent, that defendant's occupation by the election of plaintiff was changed from that of vendee to that of lessee, and that the plaintiff was entitled to recover. *Dunn* v. *Tillery*, 497.

Held further, that the incapacity of plaintiff to make title to the land exonerated defendant from the payment of the purchase money. *Ibid.*

See Adverse Possession 4.

LARCENY—See Indictment 7.

LATENT AMBIGUITY—See Deed 3.

LEASE—See Landlord and Tenant.

LEGACY AND LEGATEE:

1. Where a testator bequeathed to certain of his children a fund arising from a policy of insurance which belonged to them all equally, and directed that in the event the fund should be used in the payment of his debts, the bequest should be made good out of his land, and the residue of the land divided among all his children equally, thereby putting the children not included in the bequest to an election between their interest in the insurance money and their claim to the land under the will; *It was held*, that they were entitled to an account to ascertain how much of the insurance fund had been applied

to the payment of the debts before they could be compelled to make their election. *Weeks* v. *Weeks*, 77.

2. Parties put to an election between land and another fund, have no right to call for a sale of the land to ascertain its value before making their election; they must rely upon their own judgments. *Ibid.*

See Counterclaim 2; Executors and Administrators 2, 15, 21, 22; Will 3.

LEGISLATIVE POWER—See Statute of Limitations 4.

LIEN—See Executors and Administrators 7.

LIS PENDENS—See Pleading 2.

LOST RECORDS—See Parties 5; Pleading 7.

LUNATIC—See Jurisdiction 7, 8, 9.

MALICE—See Injunction 3.

MARRIAGE—See Husband and Wife,

MISTAKE—See Boundary 5; Practice 9, 26.

MONEY PAID TO ANOTHER'S USE—See Contract 27.

MORTGAGE:

1. The registration of a mortgage deed executed without the State, the execution whereof is not proved according to law, (Bat. Rev. ch. 35, § § 7, 8,) is ineffectual to pass title against creditors or subsequent purchasers for value. *Todd* v. *Outlaw*, 235.
2. Such registration does not have the effect of actual or constructive notice of the existence of the mortgage deed, so as to affect a subsequent purchaser for value. *Ibid,*
3. A mortgage deed, defectively registered, does not create an equity in the mortgagee which follows a deed from him and attaches itself to the legal estate in a subsequent purchaser from the mortgagor. *Ibid.*
4. A mortgagee is a purchaser for value, and whether the consideration is adequate or not will not affect the legal title;

Therefore, where the plaintiffs took a mortgage from A to secure future advancements, there being a prior mortgage to B, the defendant's grantor, defectively registered; *It was held*, that if after the execution of plaintiff's mortgage, and before they had made any part of or all the advancements stipulated, they had been fixed with notice of defendant's equity, any advancements subsequently made by them would have been made at their peril; but if they were unaffected with notice before they paid out their money, their legal title must prevail as a security for re-payment. *Ibid.*

5. A deed by the mortgagor in possession to a third party, with notice of the mortgage, conveys only the equity of redemption, and does not pass such a colorable title as may ripen by possession into an absolute legal estate. *Parker* v. *Banks*, 480.

6. Registration of a mortgage is notice to all purchasers from the mortgagor subsequent to such registration. *Ibid.*

7. Where a mortgage is given to secure several notes falling due at different times, the possession of the mortgagor or his assignee is not to be deemed hostile to the mortgagee until the maturity of the last note. *Ibid.*

8. Mere knowledge on the part of the mortgagee, that the mortgagor has conveyed an absolute estate in the mortgaged property to a third party, does not estop the mortgagee from asserting at any time his legal rights against such third party. *Ibid.*

9. While it is a general rule that a power of sale under a mortgage deed must be executed by the mortgagee in person, yet if such sale be conducted by the attorney of the mortgagee, who subsequently ratifies the same by making the necessary deed for the property, the mere fact that the sale was conducted by the attorney in the absence of the mortgagee will not invalidate the title derived thereby. *Ibid.*

10. Where a mortgage deed directs a cash sale upon default of the mortgagor he can not be heard to complain that the mortgagee sold on credit and made title to the purchaser, as such sale and conveyance extinguish the mortgage debt to the extent of the purchaser's bid. *Ibid.*

11. Where one partner executes a mortgage on a stock of goods to secure payment of his share in the purchase of the same, and upon a subsequent dissolution of the firm and sale of its effects by a receiver, the purchaser acquires title subject to the right of the mortgagee to his proportionate share of the assets. The mortgagor is also a creditor of the firm as to any amount ad-

vanced by him after the date of the mortgage. *Burbank* v. *Wiley*, 501.

See Husband and Wife 9; Indictment 6; Practice 57, 58.

MORTGAGOR AND MORTGAGEE—See Adverse Possession 4; Evidence 14, 15; Landlord and Tenant 6; Mortgage.

MOTION IN THE CAUSE—See Practice 5, 8, 9, 13, 56.

MOTION TO ISSUE EXECUTION—See Bankruptcy 2.

MOTION TO VACATE JUDGMENT—See Practice 43, 44, 45.

NEW PROMISE—See Bankruptcy 6.

NEW TRIAL—See Judge's Charge 6, 7; Practice 20, 21, 23, 55.

NOTE:

1. A note, executed by a distributee to the administrator of an estate and expressed on its face to be for money loaned, but which was in truth executed to secure money *advanced in part payment of his distributive share*, is not rendered illegal by the fact that the money was applied to the purchase of a substitute with the knowledge of the administrator. *Williams* v. *Williams*, 411.

NOTICE—See Contract 1; Counterclaim 1; Executors 1, 7; Mortgage 2, 4, 5, 6, 8; Pleading 2; Practice 9, 21, 28.

NUISANCE—See Indictment 3.

NULLITY—See Executors 13, Indictment 1.

NUL TIEL RECORD—See Practice 11.

OBLIGORS—See Contract 20.

OFFICIAL BOND:

1. In an action for breach of an official bond, where it appeared that the officer, being re-appointed to the office, had renewed his bond in the same amount and with the same sureties, and

the plaintiff declared upon and alleged a breach of both bonds, and the defendant demurred for a misjoinder of causes of action; *Held*, that the demurrer was properly overruled. *Matthews* v. *Copeland*, 493.

2. Where a clerk and master sold certain land under decree of a Court of Equity and had collected only a part of the purchase money, when in 1868, under C. C. P. § 142, he delivered to his successor in office (the clerk of the Superior Court) all the papers, &c., in the case; and thereupon, by consent of the parties, the papers, &c., were re-delivered to him to be proceeded with and collected; *It was held*, that upon his delivery of the papers, &c., to the Superior Court clerk, his official duties, powers and liabilities ceased, and the sureties on his official bond were not liable for anything thereafter done by him. *Gregory* v. *Morisey*, 559.

3. Where, in such case, gold bonds had been taken for the purchase money and the clerk and master had collected a portion of them, part in currency and part in gold by consent of parties, who received from him whatever he collected, whether currency or gold; *It was held*, that from the whole amount of his receipts while clerk and master should be deducted the amount of his commissions and his disbursements during that time; that the sureties on his bond were liable for the amount of the balance due (with twelve per cent interest from the date of the summons) in currency, with the addition of the present premium on gold, on that part of the said balance due on his gold collections and disbursements. *Ibid.*

4. In such case, the clerk and master will be liable for the amount due from the sureties as above, and also for his subsequent collections, less the amount of his disbursements and commissions with twelve per cent interest from date of summons. *Ibid.*

5. The rule that a dishonest agent should not be allowed commissions is too rigid for application in this case, there being no facts stated which would make such rule applicable. *Ibid.*

See Husband and Wife 12; Pleading 3; Superior Court Clerk.

OVERRULED—*Stone* v. *Mashall*, 7 Jones 300 (See *Morris* v. *Pearson*, 253).

OWNERSHIP—See Indictment 10, 11.

PAROL AGREEMENT—See Contract 23, 24.

PAROL EVIDENCE—See Deed 1, 3, 9; Evidence 5; Practice 11.

PARTIES:

1. Where there are several parties defendant to an action pending in the Superior Court, and one of them is a non-resident, a motion by such defendant to remove the action to the United States Court (under U. S. Rev. Stat. § 639) will be granted, if the other defendants are not necessary parties and a full and final determination of the matter can be had without their presence in Court. *Swann* v. *Myers*, 101.
2. In an action to recover land, in the possession of M, a non-resident defendant, who claimed the legal estate therein, where the plaintiffs alleged that the co-defendants of M were their trustees and held the legal estate in the land for their use; *It was held*, that the co-defendants of M were not necessary parties defendant, that their interest in the land, if any, was adverse to M, and that they were substantially plaintiffs; and that the action, on motion of M, should be removed for trial to the United States Court. *Ibid.*
3. The county treasurer is the proper plaintiff in an action on the bond of a Superior Court clerk to recover money collected by him as taxes on suits. *Hewlett* v. *Nutt*, 263.
4. Where a defendant in a civil action dies after verdict and before judgment, the plaintiff is entitled to a judgment without waiting to make the personal representatives or heirs of the defendant, as the case may be, parties to the action. *Beard* v. *Hall*, 506.
5. It *seems* that all persons whose estates may be affected by a proceeding to restore lost records, should be made parties. *Cowles* v. *Hardin*, 577.

See Practice 10, 15; Supplemental Proceedings 3; Vendor 2; Witness.

PARTNERSHIP—See Mortgage 11.

PENALTY—See Statute of Limitations 2.

PENDENCY OF ACTION—See Practice 33, 34.

PERJURY:

1. An indictment against a defendant for perjury assigned in an oath taken by him in a bastardy proceeding entitled, "The

State on relation of M v. B," which refers to the same as constituted "between the State and the said B" and as it appeared on the minute docket, sufficiently sets out the substance of the record and identifies the case. *State* v. *Brown*, 642.

2. In such case, where it appeared that the defendant swore he was not the father of the child and had not had sexual intercourse with its mother; whereas the mother swore that he was the father, and other witnesses proved the defendant's confessions that such intercourse had taken place about five months before the birth of the child; *It was held*, that the false evidence was material, and warranted a verdict of guilty. *Ibid.*

PLEADING:

1. In an action before a Justice of the Peace on a promissory note, an exhibition of the same accompanied with a statement that a specified sum is due thereon, which the plaintiff seeks to recover, is a sufficient complaint. *Evans* v *Williamson*, 86

2. A party to an action who desires to claim the protection of a notice by *lis pendens*, must in his pleadings specifically set forth and claim the benefit of such plea. *Todd* v. *Outlaw*, 235.

3. A complaint by the board of commissioners upon the official bond of a county tax collector, alleging a default of payment to the county treasurer is demurrable if it fails to set forth directly and positively, and not by way of recital merely, that the treasurer improperly neglects or refuses to sue. *Com'rs of Pender* v. *McPherson*, 524.

4. Where a plaintiff filed his complaint in an action at the appearance term with a verification substantially in the form prescribed by C. C. P. § 117, and the defendant filed an answer thereto without such verification; *Held*, that the plaintiff on motion was entitled to judgment, as for want of an answer. *Alspaugh* v. *Winstead*, 526.

5. A complaint (or declaration) which merely states a conclusion of law, and not the facts from which that conclusion is derived, is demurrable both at common law and under the C. C. P.; *Hence*, a complaint which simply alleges that the defendant is indebted to the plaintiff and that the debt has not been paid, is subject to demurrer as not stating a sufficient cause of action. *Moore* v. *Hobbs*, 535.

6. If a declaration (or complaint) in debt be upon simple contract, the *consideration* must be set forth with the other facts. If it be upon a specialty, the specialty must be set forth and that imports a consideration. *Ibid.*

7. In a special proceeding under an act of assembly to restore certain records lost by fire or other casualty, it is necessary to conform exactly to all the terms prescribed by the statute; and where such statute directs that the complaint of the petitioner "shall be sworn to as in other actions," the want of a proper verification is a fatal defect, for which judgment will be arrested. *Cowles* v. *Hardin*, 577.

8. In such a proceeding an affidavit by the agent of the petitioner that the facts set forth in the complaint "are true to the best of his knowledge, information and belief," is an insufficient verification. *Ibid.*.

See Contract 2, 3, 21; Counterclaim; Executors 14; Official Bond 1; Practice 11, 12, 31, 34, 36, 46, 52; Statute of Limitations 1.

POSSESSION—See Adverse Possession 1; Mortgage 5, 7; Practice 21.

PRACTICE:

1. Where the Court below continued an action, the pleadings raising issues to be tried either by a jury or by the Court, and the Court holding that a trial could not then be had; *Held*, not to be error. *Isler* v. *Dewey*. 1.

2. The affirmative of an issue "Did plaintiff's testator pay or purchase the note" in suit, is upon the plaintiff. *Hudson* v. *Wetherington*, 3.

3. The rule that a party alleging an affirmative is bound to prove it, means the affirmative of any matter the truth of which is essential to his case. *Ibid.*

4. Where the Court below ruled that the affirmative of the issues was upon the defendant and required him to open the case by introducing evidence and then allowed the plaintiff to open and conclude the argument, he having also introduced evidence; *Held*, to be error. *Ibid.*

5. A party can not resort to a new action where the relief demanded can be obtained by motion or proceeding in the original action; *Therefore*, where land belonging to an infant was sold by a clerk and master under decree of a former Court of Equity, and the note for the purchase money was executed to him as guardian, (he having become guardian of the infant after the sale), and on settlement the note was thereafter transferred to the ward; *It was held*, that the ward could not bring an action upon the note and to subject the land to its payment, but was limited to her remedy by motion in the original cause; and this is so, notwithstanding the fact that the original cause

was never docketed pursuant to C. C. P. § § 400, 401. *Lord* v. *Beard*, 5.

6. Where land belonging to an infant was sold by a clerk and master under decree of a Court of Equity which directed title to be retained until the payment of the purchase money, and a note for the purchase money was executed by the purchaser to the clerk and master as guardian of the infant (he having become guardian subsequent to the sale) who thereupon made title to the purchaser; and thereafter strangers to the decrees made in the original cause became *bona fide* purchasers of the land with notice of the non-payment of the purchase money by the original purchaser at the Master's sale; and the note on settlement with the guardian had become the property of the ward; *It was held*, that the ward could not maintain a separate action against the purchasers of the land to subject the same to the payment of the note, but was limited to her remedy by motion in the original cause. *Lord* v *Merony*, 14.

7. Land sold under decree of Court remains in *custodia legis* until the final disposition of the case by payment of the purchase money and execution of title by the regular order of the Court, and all who claim title, mediately or immediately, through the first judgment of the Court and before the final disposition of the cause, must claim subject to the rights of the parties to the original suit, and to the orders of the Court made or to be made in that suit. *Ibid.*

8. A party to an action seeking relief against a judgment rendered therein, must do so by motion in the original action; he can not maintain a separate action. *Askew* v. *Capehart*, 17.

9. A motion under C. C. P., § 133, to correct errors and mistakes in a judgment must be made within one year after *rendition of the judgment*; the law presumes that every party to an action takes notice of all that occurs in the progress of the action and of the judgment rendered. *Ibid.*

10. Where the plaintiffs claimed as assignees of M, and failing to prove the assignment by reason of technical difficulty, obtained leave to have M. brought in as a party plaintiff, and the jury found for the plaintiffs, the judgment should have been in favor of M to the use of the other plaintiffs, the real parties in interest. *March* v. *Verble*, 19.

(The Court *suggests* that in a case of radical amendments like the above, either the defendant should be allowed a mistrial, or the plaintiff should be taxed with such costs as may be presumed to result from the change in the character of the action.) *Ibid.*

11. The plea of *nul tiel record* is tried by the Court upon an inspection of the record itself, and when the record is regularly certified by the proper officer, it cannot be explained by parol, but is conclusive upon this plea. *Harrell* v. *Peebles*, 26.

12. Where, upon a *sci. fa.* to enforce a judgment, the defendant pleads *nul tiel record* and the Court finds the issue in favor of the plaintiff, such finding is not conclusive as to the validity of the judgment denied, but only as to its existence. *Ibid.*

13. An irregular judgment may be impeached and set aside on motion within any reasonable time upon parol proof that it was not rendered according to the course of the Court. *Harrell* v. *Peebles*, 26.

14. Where issues of law and fact are joined in term time before a Court and jury, and afterwards, by consent of counsel, the case is withdrawn from the jury, the facts being agreed upon, and the questions of law left open for His Honor's decision during the session of his Court in a neighboring county, a judgment rendered at such last named Court in the absence of counsel and without argument or briefs filed, and not communicated to the defeated party until six months after its rendition, is not irregular, but is conformable to the present practice and to the provisions of the Constitution, Art. IV § 22, and C. C. P. § 315. *Ibid.*

15. Where the record in such case states that a jury was duly impannelled and found all issues in favor of the plaintiff, upon which the judgment in question was rendered, any party in interest is entitled to have such record amended and made to speak the truth. *Ibid.*

16. It is not contemplated, under C. C. P. § 192, that a separate action shall be brought upon an injunction bond; the damages sustained by reason of the injunction shall be ascertained by proper proceedings in the same action, by reference or otherwise as the Judge shall direct. *N. C. Gold Co.* v. *N. C. Ore Co.*, 48.

17. It is not error for the Court below to direct that issues of fact, raised by exceptions to the report of a referee appointed to ascertain the damages sustained by reason of an injunction, be submitted to a jury. *Ibid.*

18. It is not error for the Court below to set aside a reference for the statement of an account, after the report has been made and exceptions filed, and proceed to try the case; such action is a matter of discretion and not reviewable by this Court. *Bushee* v. *Surles*, 51.

19. Nor, in such case, is the exercise of the discretionary power of the Court below in refusing to allow the defendants to amend their answer, reviewable by this Court. *Ibid.*

20. Where the issues submitted to the jury on the trial in the Court below were confused, it was not error to set aside the verdict and order a new trial. *Tankard* v. *Tankard*, 54.

21. Where in an action to recover land, the replication of the plaintiff admitted the open and notorious possession of defendant's ancestor when plaintiff purchased, and on the trial the jury found that defendant's ancestor had certain equitable rights against plaintiff's vendor, and also found that the plaintiff was a *bona fide* purchaser for value without notice; *It was held*, that the possession of defendant's ancestor was actual notice to plaintiff of his equities in the land, and that the facts submitted and the findings of the jury were inconsistent and contradictory, and a new trial was properly ordered. *Ibid.*

22. It is the constitutional right of every litigant to have the issues of fact joined in the progress of his cause determined by a jury, except where he voluntarily waives the privilege; and *therefore* a compulsory reference of such issues to the determination of a single person is *error*. *Bernheim* v. *Waring*, 56.

23. If the Judge to whose decision are referred both the law and the facts of a case under C. C. P. § 240 should fail to find the facts fully and distinctly, so that his conclusions of law can not be reviewed on appeal, the case will be remanded for a fuller finding on the facts. *Straus & Co.* v. *Beardsley* 59.

24. It is the duty of an appellant excepting to the rejection of evidence to set forth the evidence offered, so that the appellate Court may judge of the propriety of its rejection. *Ibid.*

25. A Court of Equity will not disturb a sale of land for division, made by a commissioner of the Court, after a decree of confirmation merely because of an advance offered in the price; *Aliter*, if an advance of ten per cent is offered before confirmation. *Blue* v. *Blue*, 69.

26. Generally, such a sale will not be set aside after confirmation except upon the ground of fraud, but "fraud" should here be understood in its largest sense as including those cases of accident, mistake and surprise of which it is unconscientious to take advantage. *Ibid.*

27. In order to acquire such sanctity as will make it inviolable except for the causes above set forth, a judgment or decree must be regularly rendered according to the course and practice of

the Court. An irregular judgment is entitled to no such protection. *Ibid.*

28. A judgment confirming the report of a commissioner selling for division rendered without notice to the parties in interest to come in and oppose the same if so advised, is an irregular judgment and may be vacated on motion. *Ibid.*

29. Except in the case of an order merely formal and of course, a Probate Court has no power, on its own motion and without application from any party in interest, to make any order in an action. Such order is irregular and voidable, if not void. *Ibid.*

30. A Court of Equity will set aside a judicial sale for division when it appears, (1) that the commissioner to make the sale sold for cash instead of on credit as he was directed by the Court to do, and (2) that there was a grave mistake as to the area of the land, common to all parties. *Ibid.*

31. A judgment declaring expressly or impliedly certain facts as admitted by the pleadings, can only be reviewed (if at all) upon some direct proceeding instituted for that purpose. *Weeks* v. *Weeks*, 77.

32. No Court has power to order a sale of land except where it is bound by some trust, or the like; or when the power is given by statute. *Ibid.*

33. The fact of the pendency of another action or proceeding involving the same controversy between the same parties as the one under consideration must appear of record by plea, answer or demurrer before this Court will notice it. *Smith* v. *Moore*, 82.

34. If two actions are between the same parties for the same cause, and the first is so constituted as to afford complete relief to all the parties, the second is unnecessary, and must be dismissed.

If a final decree has been entered in the first, this would bar a new action, or even a motion in the same action, until the decree is impeached or vacated for cause.

If the allegations in the second action should set forth the substance of the pleadings in the former, and disclose facts calling for the same measure of final relief as in the first action, and nothing more is demanded, such pleading is demurrable. *Ibid.*

35. *It seems* that there is no means known to our practice of holding a commissioner appointed to make a judicial sale pecuniarly responsible for the money collected by him; except by

an action instituted by the parties entitled to such money. *Ibid.*

36. The title to real estate can not be drawn into controversy by the defendant on a trial in a Justice's Court except by delivering to the Justice an answer in writing showing that such title will come in question. *Evans* v. *Williamson*, 86.

37. The reference in the constitution (Art. IV § 27) and Battle's Revisal (ch. 63 § § 16, 18) to controversies respecting the title to realty is, probably, meant to be applied only to those cases where the defendant sets up title in himself, and not where he alleges title in a stranger for some collateral purpose; *Therefore*, where the defendant, sued upon a promissory note, undertook to show, by way of establishing a failure of consideration, that it was given for timber growing upon land the title to which was in a third party, *Semble*, that the title to land was not in dispute within the purview of the constitutional and statutory provisions. *Ibid.*

38. Where on a re-hearing of a case in this Court, it appears that no exception to the amount of the judgment was taken in the Court below on the trial, nor any issue submitted to the jury, nor any reference asked for to ascertain what was really due, and no error was pointed out in regard thereto on the former hearing, this Court will not disturb the judgment. *Dobson* v. *Chambers*, 142.

39. A report of a referee, in a reference under the Code, is not in the nature of a special verdict and conclusive as to the facts, but is reviewable on exceptions. *Lawrence* v. *Hyman*, 209.

40. An interlocutory order is always under the control of the Court, pending the action in which it is made. *Shinn* v. *Smith*, 310.

41. This Court will assume that the date of a judgment is the date of the beginning of the debt upon which it is rendered, when there is nothing in the record to the contrary. *Hill* v. *Oxendine*, 331.

42. Where the report of a referee does not state fully and distinctly his findings on the facts, so that his conclusions of law may be reviewed by the Court, the case will be remanded, in order that the defect may be supplied. *Norment* v. *Brown*, 363.

43. On a motion to set aside a judgment, where it appeared that the original summons was not signed; that no pleadings were filed and no evidence of debt exhibited; that no jury were empannelled and no issue tried at the term when judgment was taken; that the entries upon the summons docket and minute

docket conflicted, and no attorney was marked for defendant; *It was held*, that the judgment was *irregular* and should be set aside, although there was no allegation of fraud, and although the motion was not made within one year. *Monroe* v. *Whitted*, 508.

44. Upon a motion to vacate a judgment, it is the duty of the Court below to find the facts upon which its judgment is grounded, and on appeal to this Court to set them forth upon the record. *Jones* v. *Sweepson*, 510.

45. Where a defendant in a civil action wrote to his regular attorney who lived in Northampton county, and notified him that he was summoned to appear at Fall Term, 1876, of Wayne Superior Court, but did not request him to attend to the case and took no further notice of it himself; his attorney did not attend the Courts in Wayne or reply to defendant's letter, but overlooked the matter; and judgment by default was regularly entered, of which the defendant had actual notice in January, 1877;

It was held, that he was not entitled on a motion made in December, 1877, to have the judgment set aside on the ground of surprise, inadvertence or excusable neglect under C. C. P. § 133. *Hyman* v. *Capehart*, 511.

46. It is not in the province of a Judge to order the reformation of pleadings to remove defects, though upon application he may permit it to be done; *Therefore*, where on the trial of an action the Court below declared that the defences were inconsistent and contradictory, and directed the defendant to elect on which one he would rely and amend his answer accordingly; *Held*, to be error. *Ten'Broeck* v. *Orchard*, 518.

47. Where the decision of all questions both of law and fact is left to the Judge below under the provisions of C. C. P. § 240, his findings and conclusions will not be reviewed by this Court, unless exceptions appear to have been aptly taken, or error is distinctly pointed out. *Chastain* v. *Coward*, 543.

48. Where one agrees to take a judgment against a third party in satisfaction of a debt, all inquiry as to the amount realized on such judgment is irrelevant in a suit for the recovery of the original debt. *Ibid.*

49. In order to obtain a review by this Court of proceedings in the inferior tribunals, the exceptions taken in the Courts below must be distinctly pointed out, together with the facts upon which they depend. This Court will not search for error

through obscure and voluminous records. *Meekins* v. *Tatem*, 546.

50. The only exceptions to this rule in civil causes are where there is a want of jurisdiction, or where, upon the whole case, it is apparent that the plaintiff is entitled to no relief. *Ibid.*

51. The title to property seized under the provisional remedy of claim and delivery, can not be drawn into question upon an inquisition to ascertain the damage to the defendant where the seizure was irregular. *Manix* v. *Howard* 553.

52. Plaintiffs alleged that defendant owed them a certain amount for goods sold and delivered. Defendant answered denying the debt and setting up a compromise between them and the plaintiffs' counsel by which defendant was to pay plaintiffs fifty per cent of the alleged indebtedness on condition that it should be "established." The plaintiffs replied, reaffirming the contract and alleging that the debt was to be "established" by an affidavit made before a proper officer, with which condition the plaintiffs had complied; *Held*, that under such pleadings it was not improper to submit to a jury an issue as to the validity of the original debt unaffected by the compromise, especially where the counsel on both sides assented to the framing of the issue. *Fickey* v. *Merrimon*, 585.

53. Plaintiffs alleged a sale to defendant in person, which defendant denied. On trial plaintiffs' counsel, upon suggesting that the sale was good, whether made to defendant or his agent, was interrupted by the defendant's attorney who insisted that the plaintiffs' witness testified to a sale direct to the defendant; whereupon the Judge inquired,—"Does the record show this?" Upon plaintiffs' counsel's assent, the Judge demanded, "How then do you argue that they were delivered to an agent?" Counsel replied, "The deposition of S. G. M. will fix that," upon which His Honor said, "Very well; proceed;" *Held*, that the transaction was not an intimation of an opinion by the Judge under the act of 1796 forbidding the expression of an opinion by him upon the facts of the case. *Ibid.*

54. It is not within the privilege of counsel in argument to a jury, to use language calculated to humiliate and degrade the opposite party in the eyes of the jury and by-standers, particularly when he has not been impeached. *Coble* v. *Coble*, 588.

55. Where, on the trial below, a witness for plaintiff had been impeached by the testimony of defendant and plaintiff's counsel said in addressing the jury "that no man who lived in defendant's neighborhood could have anything but a bad charac-

ter; that defendant polluted everything near him, or that he touched; that he was like the upas tree shedding pestilence and corruption all around him;" *Held*, that the defendant was entitled to a new trial. *Ibid.*

56. Where land was sold under decree of a Probate Court and notes secured by mortgage on the land taken to secure the deferred payments, the only remedy for their collection is by motion in the cause in the Probate Court; an independent action on the notes can not be sustained. *Hoff* v. *Crafton*, 592.

57. In such case, an order by the Probate Court to collect the notes by a sale of the mortgaged premises is not in any sense a proceeding to foreclose a mortgage; it is simply an order directed to its commissioner to proceed under the mortgage deed and convert the property into money to pay the debts secured. *Ibid.*

58. In such case, the terms of sale prescribed in the mortgage deed can not be changed by the Court without the consent of all parties interested. *Ibid.*

59. Where, in such case, there was a conflict in the Probate Court as to the ownership of the notes and issues in regard thereto were ordered to be made up and sent to the Superior Court for trial, and thereupon the case was carried by appeal to the Superior Court; *It was held* to be error for the Superior Court to remand the case to the Probate Court without trying such issues: they should have been passed on and decided and then the cause should have been remanded to the Probate Court to be proceeded with and closed. *Ibid.*

60. The refusal of the Court below to allow counsel to comment on irrelevant matter is not assignable for error, even though the refusal be based upon invalid reasons. *State* v. *Parrott*, 615.

See Contract 9, 15; Injunction 2; Judgment 2, 3; Parties 1, 2; Probate Court 1.

PRACTICE IN SUPREME COURT—See Contract 9; Practice 33, 38, 41, 47, 49, 50.

PRIVILEGE OF COUNSEL—See Practice 54, 55.

PROBABLE CAUSE—See Injunction 3.

PROBATE COURT.

1. An application to the Probate Court to incorporate into the record of a will an agreement between the executor and the other parties interested under it, that the former, in consideration of a promise by the latter to forbear resisting the probate thereof, would pay certain legacies and a sum additional, which should be a charge on the land of the testator, is irregular. *Gardner* v. *Anderson*, 24.
2. The Probate Court has jurisdiction of claims for legacies, but not of claims founded on contract. *Ibid.*
3. Petitions to sell real estate for assets by executors or administrators must be filed in the Probate Court. *Wood* v. *Skinner*, 92.
4. When issues of fact are raised on such petitions, it is the duty of the Probate Court to transfer the trial thereof to the Superior Court in term time where all the questions, both legal and equitable, can be settled. *Ibid.*
5. The Probate Court has original jurisdiction of a proceeding to remove an executor. *Barnes* v. *Brown*, 401.
6. When, in the course of such a proceeding, it appears inferentially that the executor has become a bankrupt since the death of his testator, and when it is clearly shown that he is the owner of no property above his exemptions, that he has neglected for six years to file in the proper Court an inventory or return of any sort, and has failed to convert the personal property into money for the payment of debts, it is the duty of the Probate Court, upon the application of judgment creditors, to require such executor to give bond for the faithful discharge of his duties, and in default of such bond, to remove him from his office. *Ibid.*

See Guardian and Ward 1; Jurisdiction; Practice 29, 56, 57, 59.

PROBATE OF DEED—See Registration 2.

PROCEEDING TO DRAIN LAND:

1. Under ch. 222, Laws 1876-7, proceedings to drain land must be commenced by summons returnable to a regular term of the Superior Court. *Bunting* v. *Stancil*, 180.
2. The provisions of ch. 142, Laws 1876-7, are repealed by ch 222. *Ibid.*

PROCESSIONING LAND:

1. In a proceeding under the processioning act, Bat. Rev., ch. 91, it is not necessary that the processioner should sign the report of the free-holders; it is sufficient if it appear affirmatively from the report that he was present participating with them. *Britt* v. *Benton*, 177
2. In such proceeding it is sufficient if a majority of the free-holders act. *Ibid.*
3. The act for processioning land having been in operation since 1723, the long acquiescence of the Courts raises a presumption of its constitutionality which, at all events, cannot be questioned by one who has voluntarily submitted his claim to the statutory tribunal for the settlement of disputed boundaries. *Ibid.*

PROFANE SWEARING—See Indictment 3.

PURCHASER:

1. A purchaser at a sale of land for division is under no obligation to disclose his opinion that the area of the land is greater than it is described to be at the sale. *Blue* v. *Blue*, 69.

See Bankruptcy 5; Executors 7, 13; Mortgage 6, 11; Practice, 6, 7, 21; Trusts 5; Vendor 1, 2.

PURCHASE MONEY—See Landlord and Tenant 6; Vendor 1, 2.

QUANTUM MERUIT—See Contract 21.

RECITAL IN DEED—See Deed 1.

REFEREE—See practice 16, 17, 18, 22, 23, 39, 42, 47; Trial 1.

REFUNDING BOND—See Executors 1, 2.

REGISTRATION OF DEED:

1. The "Cherokee Nation" is a territory within the meaning of the statute, (Bat. Rev. ch. 35, § 8. *Whitsett* v. *Forehand*, 230.
2. The certificate of the "Chief of the Cherokee Nation," under its great seal, that a Judge, before whom the probate of a deed is taken, is such Judge &c., is sufficent to entitle the deed to probate and registration in this State. The word "Governor"

in the statute must be taken to mean the Chief Executive Officer of a State or Territory, having its great seal. *Ibid*

See Deed 4; Mortgage 1, 2, 3, 6.

REMOVAL OF CAUSE—See Parties 1.

REMOVAL OF EXECUTOR—See Probate Court 5.

REMOVAL OF GUARDIAN—See Guardian and Ward 1,

RENTS—See Executors 20; Husband and Wife 12; Landlord and Tenant.

RESERVATION OF LIFE ESTATE—See Deed 4.

RESTORING RECORDS—See Pleading 7, 8.

HT TO OPEN AND CONCLUDE—See Practice 4.

RIGHT OF WAY—See Roads.

ROADS:

1. No appeal lies to this Court from the judgment of the Superior Court upon a petition to discontinue a public road, heard on appeal from the action of the Board of County Commissioners. *Ashcraft* v. *Lee*, 34.
2. Such proceeding is regulated by statute and the exercise of the power thereby granted to the county authorities is a matter of discretion, subject to the right of appeal to the Superior Court. *Ibid.*
3. The mere user of a footpath or neighborhood road, however long the time, will not raise a presumption of its dedication to public use, in the absence of accompanying circumstances (as if it had an overseer, &c.,) from which such dedication might be presumed. *Boyden* v. *Achenbach*, 539.
4. In an action to enforce a right of way, the complaint should set out *how* the plaintiff acquired such right, *Ibid.*
5. A private action does not lie for obstructing a public way except for a special injury sustained by the plaintiff. *Ibid.*

SALARIES AND FEES:

The clerk of the Supreme Court is not embraced in the provision of ch. 247, Laws 1874-'75, directing the payment of half fees in certain cases. He is entitled to full fees when the defendant in a criminal action appeals to this Court. *Clerk's office* v. *Com'rs of Richmond* 598.

SALE OF LAND—See Bankruptcy 5; Legacy 2; Mortgage 9, 10; Practice 6, 7, 25, 26, 28, 30, 32, 56, 57; Purchaser 1.

SEAL—See Contract 4.

SEPARATE ESTATE—See Husband and Wife.

SHARES IN NATIONAL BANKS—See Taxes 3, 4.

SPECIAL PROCEEDING—See Jurisdiction 1, 2.

SPECIAL VERDICT—See Practice 39.

SPECIFIC PERFORMANCE—See Action to Recover Land 4; Contract 25.

STATUTE OF LIMITATIONS:

1. If suit be brought March 20th, 1872, on a cause of action, founded on simple contract, arising subsequent to August 1st, 1860, and such action be dismissed for want of jurisdiction, in March, 1874, the plea of the statute of limitation will not avail against a second suit on the same cause of action begun Dec. 31st, 1874. *Straus & Co.* v. *Beardsley*, 59.
2. An action against a clerk for the penalty of $500, prescribed by Rev. Code, ch. 28, § 7, if not brought within one year, is barred by the statute of limitations under C. C. P., § 35. *Hewlett* v. *Nutt*, 263.
3. An action or proceeding to re-open an account stated and readjust a settlement made under the supervision of a Court of competent jurisdiction, and sanctioned by a decree of the Court, must be brought within three years from the rendition of such decree, if the plaintiff (or petitioner) be under no disability, and the case involve no equitable element improper for the consideration of a Court of Law. *Spruill* v. *Sanderson*, 466.

4. The legislature has the power to repeal or suspend the effect of a statute of limitation or presumption before it operates, and to give such repeal or suspension a retroactive effect. *Pearsall* v. *Kenan*, 472.

5. The provisions of the Rev. Code, ch. 65 § 1, relative to the time of commencing actions, govern all cases where the cause of action accrued prior to the adoption of the C. C. P., Title IV. *Johnson* v. *Parker*, 475.

6. Seven years exclusive adverse possession of land under color of title will protect the occupant from the claim of the true owner, unless such owner be under some disability, and in that event, his right must be asserted within three years from the removal of the disability. *Ibid.*

See Abandonment of Wife; Executors 6; Widow 2.

STATUTORY EVIDENCE—See Evidence 20.

SUBSTANTIVE EVIDENCE—See Evidence 4.

SUPERIOR COURT—See Guardian and Ward 1; Jurisdiction; Practice 59.

SUPERIOR COURT CLERK:

A Superior Court clerk, who collects taxes upon suits, to an amount unauthorized by law, is nevertheless bound to account for the same to the proper county officer; and a surety upon his official bond is liable for his failure to do so. *Hewlett* v. *Nutt*, 263.

See Official Bond 2; Statute of Limitations 2.

SUPREME COURT CLERK—See Salaries and Fees.

SUPPLEMENTAL PROCEEDINGS:

1. Proceedings supplemental to execution lie against a private corporation created by a special act of the legislature and organized for purposes of the private gain of its share-holders. *La Fountain* v. *Southern Underwriter's Association*, 514.

2. A creditor of such corporation, when the same is insolvent, is not compelled to pursue the remedy provided in Bat. Rev. ch. 26, § 22. (Whether the provisions of that section are mandatory in regard to corporations created under the general law—*Quere?*) *Ibid.*

3. Creditors not parties to a supplemental proceeding are not entitled to share in any of the benefits arising therefrom. *Ibid.*

SURETY AND PRINCIPAL.—See Contract 16, 17, Executors 1, 4; Guardian and Ward 2, 4; Official Bond 1, 3, 2, 4; Superior Court Clerk; Trusts 3.

TALESMAN—See Jury.

TAXES AND TAXATION:

1. The tax prescribed by Rev. Code, ch. 28, § 4, on indictments, civil suits, &c., is not a tax within the meaning of the revenue act of 1858-'59, which repealed all taxes not therein imposed; nor is it a tax within the meaning of the constitution, Art. V, § 3, which requires taxes to be equal and uniform. *Hewlett* v. *Nutt*, 263.
2. Such tax is not in violation of the constitution, Art I, § 35. *Ibid.*
3. Shares in national banks owned by residents of the State may be assessed for taxation either at the place where the owners reside, or at the place where the bank is located, as the legislature of the State may elect. *Buie* v. *Com'rs of Fayetteville*, 267.
4. Under the existing laws such shares must be taxed at the place where the owner or person required to list them resides. *Ibid.*
5. An action to recover back an amount of taxes paid under protest, will not lie against a sheriff who collected the same by virtue of a list delivered to him by the register of deeds under the revenue act of 1876-'77, ch. 156, schedule B. Such list has the force and effect of a judgment and execution. *Mulford* v. *Sutton*, 276.

TENANTS IN COMMON—See Adverse Possession 1; Will 2.

TERMS OF SALE—See Practice 58.

TITLE TO REAL ESTATE—See Landlord and Tenant; Mortgage 9; Practice 36, 37; Vendor 1, 2.

TOWNS AND CITIES:

Under the Private Laws of 1868-'69, ch. 5, § 9, it is the exclusive province of the board of aldermen of the city of Wilmington

LAW LIBRARY OF University of

to declare the result of a ballot for chief of police for said city. *Price* v. *Brock*, 600.

TRANSACTION WITH PERSON DECEASED—See Evidence 4.

TRESPASS—See Landlord and Tenant 3, 4.

TRIAL:

1. Where it appeared that A who was indebted by note to B paid off and discharged, at the request of the latter, a debt due by him to C, it should have been found as a fact by the jury (or referee) whether or not the transaction was intended by the parties as an extinguishment *pro tanto* of the debt from A to B. The fact of the payment to C is in itself *some* evidence of such intent. *Norment* v. *Brown*, 368.

See Contract 13; Indictment; Judge's Charge 7; Practice 59.

TRUSTS AND TRUSTEES:

1. H conveyed certain real estate in Alabama to her son J in fee, and a cotemporaneous paper writing (not under seal) was executed by them to the effect that said real estate was J's, "to be disposed of as he sees proper; and said lands or the proceeds if sold to be his during his life, and at his death the said lands, or if sold the proceeds, to belong and to be given by him to W &c.;" J sold certain of the real estate and thereafter died; in an action by W against the administrator of J, *It was held*,

(1) That the paper writing, executed by H and J, created a trust in favor of W which attached to the conveyance of the lands to J.

(2) That the trust is to be ascertained *from the paper writing* independent of *parol* testimony.

(3) That the locality of the lands in another State does not deprive the Courts of this State of their jurisdiction to compel execution of the trust.

(4) That the plaintiff is entitled to recover out of the personal estate of J, in the hands of his administrator in this State, the proceeds of the land sold by J. *Henderson* v. *McBee*, 219.

2. A debt secured by separate deeds of trust, executed at different times, by persons liable therefor, is entitled to share *pro rata* on the full amount of the debt as it existed when such securities were given, in the distribution of the money arising

therefrom, until the debt is satisfied. *Brown* v. *Merchants' Bank*, 244.

3. In such case the debtors are alike bound to the creditor for the entire amount of the debt and their relations with each other as principal and surety can not impair the essential right of the creditor to be paid out of the assigned estates. *Ibid.*

4. A deed in trust made to secure several debts of which one is feigned and fraudulent and the others valid, will be sustained for the benefit of the true creditors, but is inoperative as to the fraudulent claim; *provided*, that neither the trustees nor the true creditors have connived at the insertion in the deed of such fraudulent debt. *Morris* v. *Pearson*, 253.

5. To the general rule that a trustee is not permitted to purchase at his own sale there are the following exceptions :—
Where the trustee has a personal interest in the property, he may, if necessary, bid it in to protect that interest. But even then, it is proper, if not indispensable, that his bidding should be sanctioned by the previous permit or subsequent confirmation of the Court, upon a full disclosure of all the facts.

And where the *cestui que trust* consent to the purchase or ratify with full knowlecge of all the facts. *Froneberger* v. *Lewis*, 426.

See Bankruptcy 5; Evidence 7, 8, 9, 10, 11; Executors 7; Husband and Wife 11; Judge's Charge 2, 6.

UNDER-LEASE—See Landlord and Tenant.

USER—See Roads.

VARIANCE—See Indictment 10.

VENDOR AND VENDEE;

1. A vendor of land can not maintain a suit for the purchase money without first tendering a good and sufficient title to the vendee. *Pascall* v. *Brandrn*, 504.

2. If the vendee die before poyment of the purchase money, the deed should be tendered to the heirs, and they should be parties defendant to a suit for the price of the land. *Ibid.*

See Contract 10, 11, 18; Landlord and Tenant 6.

VERDICT—See Indictment 1; Judge's Charge 7; Judgment 3; Parties 4.

VERIFICATION—See Pleading 4, 7, 8.

WAIVER—See Insurance 8.

WARRANTY—See Contract 10, 11.

WIDOW:

1. A widow is not barred of her right to a year's support, under the act of 1871-'72, ch. 193, § 44, by reason of adultery committed prior to the passage of the act. *Cook* v. *Sexton*, 305.
2. An application for years' support made after the expiration of twelve months from the death of the husband, is barred by the statute of limitations, Battle's Revisal, ch. 117, § 18. *Ibid.*

(In § 26, ch. 117, Bat. Rev., the first sentence ends with the word "prescribed;" the word "without" is the first word in the next sentence and should be spelt with a capital "W." *Ibid.*

WILL:

1. In expounding a will the grammatical construction must prevail, unless a contrary intention plainly appears. *Pruden* v. *Paxton*, 446.
2. A testator, by the first item of his will, devised to his wife real property exceeding in value a life estate in all his property of that character. In the residuary clause of said will he devised as follows:—"I give, devise and bequeath all my other property of every description to my beloved wife and dear children, to be divided among them according to law;" *Held*, that a farm included in such residuary clause passed to the wife and children as tenants in common of the fee. *Ibid.*
3. A testator by his will devised certain lands to his sons J and H, "on the following conditions, provided that they each pay" certain amounts to three other of his sons, infants, when they severally attain the age of twenty-one years; by the residuary clause of the will he gave all his remaining property, not before disposed of, to four daughters; the three sons died in infancy and without issue, during the testator's life time; *Held*, that the legacies lapsed and J and H took the lands devised to them without charge. *Whitehead* v. *Thompson*, 450.

See Executors 15, 16; Legacy 1, 2; Probate Court 1.

WITNESS:

1. Under § 343 C. C. P. a party to an action is a competent witness as to a transaction between himself and a person at the time of such examination deceased, when the representative of such deceased person is not a party to the action. *Shields* v. *Smith*, 517.

2. The rule of law (Bat. Rev. ch. 43 § 16) disqualifying the wife to testify for or against her husband in criminal proceedings, applies only to cases where the husband has a legal interest in the result, and does not render her incompetent to contradict his testimony for the State upon an indictment against a third party for an assault and battery upon him. *State* v. *Parrott*, 615.

See Evidence 7, 9, 10, 13, 17, 21; Practice 55.

WITNESS FEES—See Costs.

YEAR'S SUPPORT—See Widow.

In the second paragraph of statement of case in *Mizell* v. *Simmons*, *ante*, 188, read—"It was insisted by defendants that "A" was the beginning of Isaac Jordan's land, and found as a fact by the referee that patent "A" commenced on Roanoke river at a point agreed upon by the parties," the distance, &c.